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Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-925

ROY P. WINDHAM, HARDEN EVANS, JOE SKIPPER, DAVID NEXSEN, W. A. TURNER AND TOBY GASKINS, on behalf of themselves and all others similarly situated,
Petitioners,

versus

AMERICAN BRANDS, INC.; LIGGETT & MYERS, INC.; R. J. REYNOLDS, INC., (R. J. REYNOLDS TOBACCO CO.); BROWN & WILLIAMSON TOBACCO CORPORATION; THE IMPERIAL TOBACCO COMPANY (OF GREAT BRITAIN AND IRELAND)LTD.; MULLINS LEAF TOBACCO COMPANY, INC.; C. W. WALTERS COMPANY, INC.; EXPORT LEAF TOBACCO COMPANY; LOEWS THEATERS, INC., (D/B/A LORILLARD); PHILIP MORRIS, INC.; UNIVERSAL LEAF TOBACCO COMPANY, INC.; THE AUSTIN COMPANY, INC. (GREENVILLE, TENN.); J. P. TAYLOR COMPANY, INC.; DIBRELL BROTHERS, INC.; AND EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
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ROY P. WINDHAM et al., on behalf of themselves
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AMERICAN BRANDS, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

E. N. Zeigler, Attorney, on behalf of the petitioners, (hereinafter, "Tobacco Farmers"), petitions this Court to issue a Writ of Certiorari to review the rehearing En Banc decision of the United States Court of Appeals for the Fourth Circuit entered in this case on October 11, 1977.

OPINIONS BELOW

The Fourth Circuit Rehearing En Banc opinion of Judge Donald A. Russell has been reported in 1977-2 Trade Cases para. 61, 670. The Fourth Circuit Panel opinion by Judge Charles E. Wyzanski, Jr. is reported in 593 F. 2d 1016. The District Court opinion by Judge Robert F. Chapman is reported in 68 F.R.D. 641. A copy of each opinion is appended hereto as Appendix A, B, and C, respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S. Code Section 1254 (1) for determination and relief as provided in 28 U.S. Code Section 2106. The judgment of the Court of Appeals was entered on October 11, 1977 (App. A). This petition was filed within ninety days after entry of the Circuit Court decision.

QUESTIONS PRESENTED

1. Did the Circuit Court in its opinion erroneously ignore or seek to reverse the holding of this Court in *American Pipe and Construction Co. vs. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) and *United Air Lines, Inc. vs. McDonald*, U.S. 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977) with regard to the limited tolling of the statute of limitations for absent class members?

2. Did the Circuit Court err in ignoring the public policy supporting Rule 23 and private enforcement of antitrust laws by rejecting class action treatment of this antitrust conspiracy case brought under Rule 23

and substituting instead a "test case" approach with collateral estoppel and one-way intervention?

3. Does the opinion of the Circuit Court conflict with the opinions of the Third and Ninth Circuits in similar class action antitrust suits under Rule 23?

4. Did the Circuit Court erroneously hold that individual damage is the crux of a private antitrust action contrary to the holding of this Court in *Illinois Brick Company vs. Illinois*, U.S. , 97 S. Ct. 2061, 52 L. Ed. 707 (1977) that direct purchasers (or sellers) are elevated to a preferred position as private attorneys general without proof of actual injury?

5. Did the Circuit Court err in holding that the question of individual damages is so "intertwined" with the issue of liability that impact from this horizontal conspiracy to fix prices and rig bids could never be presumed?

6. Did the Circuit Court err when it held this case to be unmanageable because there was "no 'easy damage' formula" to define individual damages while, at the same time, applying the basic antitrust "before-and-after" damage formula to disprove that refusal of class action would constitute a "death knell"?

7. Did the Circuit Court err in holding that as a matter of law the Tobacco Companies would be able to contest each individual claim for damages in a "deluge of mini-trials" each by a jury?

8. Did the Circuit Court err when it repudiated the antitrust class action expertise of Judge Charles Wyzanski and failed to find an abuse of discretion by

a District Judge with little or no antitrust class action experience?

STATUTES INVOLVED

The statutory provisions are: Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2); Sections 4 and 5 of the Clayton Act (15 U.S.C. Secs. 4 and 5). Also involved is Rule 23 of the Federal Rules of Civil Procedure. In accordance with Supreme Court Rule 23 (d) the pertinent texts are set forth in the Appendix, as Appendix D.

STATEMENT

A. STATEMENT OF FACTS

This is an antitrust class action on behalf of all South Carolina flue-cured Tobacco Farmers; i.e., owners of land with tobacco allotments, lessees of allotments, sharecroppers and tenants who sold tobacco produced in South Carolina in the years 1970 through 1975. They charge the fifteen (15) defendant tobacco companies (hereinafter "Tobacco Companies") and the Secretary of Agriculture of the United States with a horizontal conspiracy to rig bids and fix prices to force the sale of tobacco at prices lower than they would have been, absent the conspiracy, in violation of Sections 1 and 2 of the Sherman Act.

The six Tobacco Farmers who bring this action are a part of a group of some 20,000 tobacco farmers who have an economic interest in flue-cured tobacco sold in South Carolina over the past six years. The tobacco in which they have an economic interest was

sold by an auction system in some 36 warehouses in 11 "markets" designated by the Secretary of Agriculture of the United States. The portion of the State in which flue-cured tobacco is produced is a compact geographical area bisected by the Pee Dee River approximately 100 miles square. It is roughly conterminous with the Sixth Congressional District in South Carolina.

The production of flue-cured tobacco is limited through assignment by the United States Department of Agriculture (hereinafter referred to as Department of Agriculture) of quotas to individual farms. The controlling factor is the number of acres which can be planted or, since 1973, the number of pounds of tobacco which a farmer may sell during a given year. The size of this allotment is of such value that it is calculated to as small a figure as a hundredth of an acre. (Transcript of Record, Vol. V, October 25, 1974, pp. 51-52). The District Court by its refusal of class action certification recognized that many small farmers and sharecroppers would effectively be denied relief. (Cir. App. 195).

Extensive and precise documentation exists for the sale of tobacco in the years in question. (Transcript of Record, Vol. V, October 25, 1974, particularly Exhibits Px. 1-10 and Px. 15). This documentation is primarily in the form of records kept by the Department of Agriculture and an individual "Tobacco Sale Bill" kept by the warehouse in which tobacco is sold. This Tobacco Sale Bill consists of four sheets; *i.e.* the original "white" copy for the warehouse, the "yellow" copy labeled "F.C. Copy", the "pink" copy labeled "Farmers Receipt", and the heavy "buff" copy labeled "Farmer's Copy." (Transcript of Record, Vol. V. Px. 15, pp. 22-24). The "F.C. Copy" goes to the Flue-

Cured Tobacco Cooperative Stabilization Corporation when tobacco is delivered to it to receive price support. The "Farmers Receipt" and the "Farmer's Copy" go to the tobacco farmer. On the copies which the farmer gets, that portion of the form showing the grades which the tobacco companies used in buying the tobacco is blanked out, and the name of the buying company is not revealed in the adjacent column. (Transcript of Record, Vol. V, October 25, 1974, Exhibits Px. 1-6, and testimony of Roy Windham, pp. 68-75).

The grading of tobacco is performed on two levels; *i.e.* the Department of Agriculture for price support and Tobacco Companies for purchasing. The Department of Agriculture through the Tobacco Inspection Act places grades on tobacco when it is delivered by farmers to the warehouse. The chief purpose of this grading has become the administration of price support through the Commodity Credit Corporation and has no relation to the Tobacco Companies' grading system. While there are 161 government grades of tobacco, these grades are merely an elaboration of 8 groups reflecting basically the location of the leaf on the tobacco stalk; *i.e.* (Starting from the top of the plant) A, wrappers; B, leaf; H, smoking leaf; C, cutter; X, lugs; P, primings; N, nondescript; S, scrap. (Exhibits Px. 11 and 12, Vol. V, Transcript of Testimony, October 25, 1974). In addition, tobacco which has been damaged is designated "U", and tobacco which has become wet ("in high order") is designated "W". (Transcript of Hearing, October 10, 1975, pp. 39-40).

The Tobacco Companies, however, have their own grading system which, according to the answers to interrogatories filed after the District Court's Order

herein by several companies, has no relation to the 161 United States Government grades and is drastically fewer in number. The number of grades as represented by grading symbols employed by the various tobacco companies buying in South Carolina varied from about 10 used by Loews Theaters, Inc. d/b/a Lorillard in 1971, to 32 used by The Austin Co., Inc., (Greeneville, Tenn.). The information necessary to establish the identity of purchasing companies, the grades by which they purchase, and the relationship, if any, of company grades to Department of Agriculture grades, was not available to Tobacco Farmers, and could only be learned through discovery which was denied by Judge Chapman as "going strongly into the merits." (See Transcript of Record, Vol. V, October 25, 1974, pp. 71-72).

Because tobacco is a highly perishable commodity and Tobacco Farmers have no means of storing tobacco once it is "in order" for sale, Tobacco Farmers have been at a terrible disadvantage in dealing with Tobacco Companies on the tobacco auction floor. This has facilitated the fixing of prices and rigging of bids by Tobacco Companies, one of the most conspicuous facets of which has been the universal use of tied bidding. Tied bidding is a system by which buyers for the Tobacco Companies bid the same price for the tobacco offered on the market thereby tying the bid, and then receive a portion of the offerings by allocation. The practice of using tied bidding by Tobacco Companies has become so flagrant that in many instances their buyers merely stood at the end of long rows of tobacco offered for sale and without going through the motion of passing down the rows and bidding on the individual piles of tobacco (generally 200 to 250 lbs.) agreed on an allocation of the entire offering among themselves. (Transcript of Record,

Deposition of David Nexsen, November 7, 1974, pp. 43-44). Tobacco Companies admit that fifty (50%) percent of the tobacco purchased is acquired through tied bidding and allocation. Tobacco Farmers estimate an even higher percentage is sold under tied bidding.

The abuse of the auction system by Tobacco Companies became intolerable at the opening of the marketing season in 1974 when, despite the increased cost of producing tobacco for market, they used the tied bidding system to offer Tobacco Farmers less for their crop than in the previous year. The matter became an issue for debate in the general election for Congressman in the Sixth Congressional District and received extensive media coverage. Both candidates charged Tobacco Companies with violation of the antitrust law, the Democratic candidate advocating a civil suit, and the Republican candidate advocating investigation by agencies of the United States government. (Petition for Mandamus, March 15, 1975, App. X. 44-45). Out of the storm of protest by Tobacco Farmers. Footnote 41 of the Circuit opinion (App. A, p. 25a) is not a correct reflection of the evidence in the record and indicates a misapprehension by the Circuit of the depth of feeling among Tobacco Farmers.
the record and indicates a misapprehension by the Circuit of the depth of feeling among Tobacco Farmers.

B. PROCEEDINGS BEFORE THE UNITED STATES DISTRICT COURT OF SOUTH CAROLINA

This action was filed July 29, 1974. On October 17, 1974, the District Court, on affidavit of plaintiffs' counsel, issued a Rule to Show Cause, returnable on October 25, 1974, why an order should not be entered determining that this action be maintained as a class action under Rule 23 (b) (3) of the Federal Rules of Civil Procedure. On June 19, 1975, the District Court heard the concluding oral argument on the class action issue.

On September 26, 1975, the District Court filed its Order denying class action status. Judge Chapman found for the plaintiffs under all four of the criteria of Rule 23(a); *i.e.* numerosity under Rule 23(a) (1); commonality under Rule 23(a) (2); typicality under Rule 23(a) (3); and representativeness under Rule 23(a) (4). However, he went on to deny class action status under Rule 23(b) (3) "because the trial of this suit would be totally unmanageable." (App. C, p. 64a). Judge Chapman certified his Order for immediate appeal under Rule 54(b). (App. C, p. 75a). In the same order, the District Court denied the motion of the Secretary of Agriculture for a dismissal or in the alternative for summary judgment. On October 21, 1975, plaintiffs filed their Notice of Appeal to the Court of Appeals for the Fourth Circuit.

C. PROCEEDINGS BEFORE PANEL OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The appeal came on for oral argument on May 6, 1975 before a three judge Panel consisting of Senior Circuit Judge Albert V. Bryan, the late Judge J. Braxton Craven, Jr. and Judge Charles E. Wyzanski, Jr., Senior District Judge, District Court of Massachusetts, sitting by designation. From the bench, Judge Wyzanski repeatedly and persistently asked counsel for the Tobacco Companies, during the course

of oral argument, what the differnce in the quantum or character of the requisite proof at a bifurcated trial on the issue of conspiracy would be if there were 20,000 plaintiffs or six. Counsel for the Tobacco Companies could not answer the question then, nor have they answered it since that time. On July 16, 1976, the Panel's decision was filed reversing the District Court as "plainly wrong" and as "an abuse of discretion." Judge Craven joined in the decision, and Judge Bryan dissented.

D. REHEARING EN BANC BY COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Tobacco Companies filed a Petition for Rehearing and Suggestion for Rehearing En Banc on July 30, 1976. Later, the Secretary of Agriculture filed a similar petition. On December 13, 1976, the Circuit Court of Appeals granted the petition for Rehearing En Banc. Oral arguments on rehearing were heard on February 14, 1977 before Chief Judge Haynsworth, Senior Judge Bryan, and Judges Craven, Butzner, Russell, Widener, and Field. Judge Harrison L. Winter recused himself. Before an opinion by the en banc court was reached, Judge Braxton Craven died May 4, 1977. On October 12, 1977, a majority of the Court of Appeals speaking through Judge Russell, affirmed the District Court's opinion. Judge Butzner dissented giving as his grounds those contained in the opinion of Judge Wyzanski speaking for the Panel.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. *THE "TEST CASE" APPROACH TO ANTI-*

TRUST CLASS ACTION SUITS ADOPTED BY THE FOURTH CIRCUIT IGNORES TOLLING OF THE STATUTE OF LIMITATIONS AND CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND DECISIONS OF THE THIRD CIRCUIT.

Exposing its lack of expertise in the law of antitrust class actions, the Circuit adopts the "Test Case" procedure in place of the class action (App. A, p. 17a). The Fourth Circuit's "approach" apparently is that if these named plaintiffs go forward and prove their individual claims at trial, thereafter the Tobacco Companies will be collaterally estopped as against the absent Tobacco Farmers who may then decide to file their own suits. (App. A, pp. 17a and 18a, fns. 30 and 32). The problems arising from this ruling are as follows:

First, this Court has repudiated the practice of "one-way intervention" in *American Pipe and Construction Co. vs. Utah*, 414 U.S. 538, 547 (1974), cf. *United Air Lines vs. McDonald*, U.S. , 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977). The Fourth Circuit seeks to revive it.

Second, the Fourth Circuit (App. A, p. 17a, fn. 30) erroneously relies on the "bellwether case" of *Katz v. Carte Blanche Corporation*, 496 F. 2d 747, 755-761 (3rd Cir. 1974), cert. denied 419 U.S. 885 (1974). It fails to recognize that in *Katz* the defendants expressly agreed to one-way intervention, as a consequence of the delay of class determination, until after trial on the merits. The Third Circuit recognized that by reason of defendants' agreeing to the delay the statute of limitations was tolled in favor of the class, *Katz, supra* at 762. Since the class action status there

remained undetermined, the statute of limitations remained tolled under *American Pipe*. Here the class is denied after a rule 54(b) appeal; so the statute will commence to run against absent Tobacco Farmers immediately should their appeal be unsuccessful, and their damages will be barred forever as it continues to run. *United Air Lines, supra.*

Third, the Circuit Court inexplicably ignores its previous view of the effect of the statute of limitations in class actions. In a closely related en banc affirmance of a denial of a civil rights class after a trial on the merits of the conditional class by the same District Court Judge Robert F. Chapman, *Roman v. ESB, Inc.*, 550 F. 2d 1343 (4th Cir. 1976), the Fourth Circuit first emphasized that *res judicata* would not apply to absent class members. *Roman, supra* at 1355. Then the Circuit notes as follows:

> Prejudice to dismissed parties in such cases may be in such forms as the running of the statute of limitations. . . . *Roman v. ESB, Inc., supra* at 1356.

The Circuit Court in *Roman, supra* at 1357, describes the tolling under *American Pipe*, and finds no such apparent prejudice to the dismissed class in *Roman*, however, because "the alleged discriminatory practices would be continuing in nature." *Roman, supra* at 1356. The Court specifically pointed out that no such prejudice had been brought to the Court's attention. *Roman, supra* at 1356. In contrast, the Tobacco Farmers brought such prejudice to the attention of the Circuit Court, both in briefs and in pointed response to a "Test Case" approach question from the Court at the rehearing oral argument. The

American Pipe decision held that the statute of limitations is tolled only until the Court "has found the suit inappropriate for class action status", *supra* at 553. Thereafter, in the case *sub judice*, it is only those Tobacco Farmers who make timely motions to intervene who will be able to avoid the statutory bar to damages *each and every day* that passes after final disposition of this appeal. *United Air Lines, Supra.*

Fourth, the Circuit Court compounds its statute of limitations oversight by adopting the dissenting opinion of Judge Aldisert in *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434, (3rd Cir. 1977). The Fourth Circuit does recognize its conflict (App. A, p. 21a fn. 35a) with the Third Circuit where the majority opinion in *Bogosian, supra*, 455-456, had adopted Judge Wyzanski's approach. Judge Aldisert concluded this dissent in *Bogosian* with a statement of his view of the law as follows:

> If the district court saw fit to reconsider its class action decision at a later point in the litigation, that would be within its power under Rule 23(c) (1). *Bogosian, supra* at 462.

The statement cited above not only fails to recognize the cessation of tolling under *American Pipe, supra* at 561, but also gives no authority for such reconsideration, especially after an appeal has affirmed the denial of certification. *United Air Lines, supra.* If a district court can always reconsider under Rule 23(c) (1) its class action denial, then the suit retains its "class action character" and the tolling of the statute of limitations should of course continue. For such a rule of law as now apparently proclaimed by the Fourth Circuit, it will obviously be necessary for this Court to overrule both *American Pipe, supra* at 561, which

held that the statute is suspended "only during the pendency of the motion to strip the suit of its class action character", and *United Air Lines* which extended tolling only for purposes of appeal.

2. *THE "TEST CASE" APPROACH TO ANTITRUST CLASS ACTION SUITS IGNORES THE POLICY BEHIND RULE 23.*

The Circuit Court does violence to the principal function of a class suit as explained in *American Pipe, supra* at 551: viz, the avoidance of a "multiplicity of activity". The District Court (App. C, p. 73a) expressly invited mass intervention which, in the instant case, could lead to some 19,994 individual motions or individual suits being filed in the District of South Carolina, each Tobacco Farmer then wanting to control his own action. This one-way intervention creates just such a multiplicity of activity. The Circuit Court thus rejects the efficiency and economy of litigation which Rule 23 promotes.

It is significant that *American Pipe, supra* fn. 20 at 551, adopted the decision in *Esplin v. Hirschi*, 402 F. 2d 94 (10th Cir. 1968). That case stands for the principal of going forward with a class action to give effect to the policy of efficiency and judicial economy behind Rule 23 and to avoid prejudice to absent class members by the limitations time bar. Frequently quoted from that opinion is a passage as follows:

> It cannot be denied that the resolution of the class action issue in suits of this type places an onerous burden on the trial court. But if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require. *Esplin v. Hirschi, supra* at 99.

In strong policy language, this Court has repeatedly proclaimed the policy of encouraging private enforcement of the antitrust laws. *Illinois Brick* and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Brunswick Corp. vs. Pueblo Bowl-O-Mat, Inc.*, U.S. , 50 L. Ed. 2d 701, 710 fn. 10 (1977), this Court noted that treble damage actions were conceived primarily as a remedy for the "people of the United States." This Court has recognized its own "desire for more vigorous antitrust enforcement" in *Vendo Company v. Lektro-Vend Corp.*, U.S. , 97 S. Ct. 2881 (1977). The dissenting justices in that case quote from earlier Supreme Court opinions that private damage remedies are not merely to provide private relief but also "to serve as well the high purpose of enforcing antitrust laws". *Vendo, supra* at 1029 fn. 10. They also characterized the Sherman Act as a "charter of economic liberty". *Vendo, supra* at 1027 fn. 5. Likewise, the antitrust laws in general and the Sherman Act in particular were denominated as the "magna carta of free enterprise" and said to be as important to economic freedom as the bill of rights is to personal freedom. *Vendo, supra* at 1038 fn. 39.

It is time for this Court to put some teeth into its salutary policy statements, reaffirm its stand on the importance of Rule 23 to the private enforcement of the antitrust laws, and make judicial economy work for the ordinary litigant. This case has already dragged on for three and one-half years without even scratching the merits. Printing costs of appeal papers for both sides alone far exceed what a notice to the class members would have cost. (They equal the

$30,000 figure that concerned the Circuit). Attorneys' fees to the Tobacco Companies and the Government easily must exceed a hundred thousand dollars.

This suit by Tobacco Farmers is vested with a special public interest, particularly so since the District Court has refused to dismiss the Secretary of Agriculture as a party defendant. It should go forward in as strong a posture as possible. The Circuit Court is in conflict with the concluding position taken by this Court in *Hawaii, supra* at 266 that class actions are "definitely preferable in the antitrust area."

3. *THE OPINION OF THE CIRCUIT COURT CONFLICTS WITH OPINIONS OF THE THIRD, NINTH AND FIFTH CIRCUITS IN WHICH SIMILAR CLASS ACTION SUITS WERE CERTIFIED UNDER RULE 23.*

It appears on the face of the Circuit Court's opinion that there is a conflict between its view of antitrust class action suits and that of the Third Circuit. In footnote 35a (App. A, p. 21a) the court observed as follows:

> The panel opinion was approved in the majority opinion in *Bogosian v. Gulf Oil Corp.* (3rd Cir. 1977) F. 2d , 46 L.W. 2105. We, however, for reasons hereafter stated, find the reasoning in Judge Aldisert's dissenting opinion more persuasive.

The majority opinion in *Bogosian*, speaking through Chief Judge Spietz, expressly adopted the Panel opinion written by Judge Wyzanski in this case. *Bogosian, supra* 1977-2 Trade Cases 61,568 at page 72,304.

(Emphasis added).

Likewise the Ninth Circuit has twice followed the Panel decision written by Judge Wyzanski. *In re Sugar Antitrust Litigation*, 1977-2Trade Cases para. 61,669 and 61,634 (9th Cir. 6-7-77 and 8-23-77). Inexplicably the Fourth Circuit omits reference to these cases although the opinion of June 7, 1977 was brought to the Court's attention. Two Judges of the Ninth Circuit first denied mandamus of Judge Boldt for having certified nation-wide class actions and in doing so adopted Judge Wyzanski's opinion. Those defendants then *In re Sugar Antitrust Litigation*, told the Ninth Circuit that the Fourth Circuit had ordered a rehearing. The first two Judges plus a third Judge refused the mandamus rehearing and concluded by noting that the Fourth Circuit had not withdrawn the Panel opinion by Judge Wyzanski and by implication reafirmed their belief in the validity of its reasoning.

The Fourth Circuit's opinion conflicts with the Fifth Circuit which recently stated in *Yoder Bros. Inc, vs. Calif-Fla.*, 537 F. 2d 1347 (5th Cir. 1976), cert. denied, 97 S. Ct. 1108 (1976), as follows:

> Particularly, the *overriding importance of the private treble damage action* in the antitrust enforcement scheme should be kept in mind. *Yoder, supra*, at 1375. (Emphasis added).

The Fourth Circuit is also in conflict, in this regard, with the Third and Seventh Circuits, particularly as seen in the well-known antitrust class action opinion of Judge Becker in the case of *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975), reversed by Third Circuit on a narrow point of antitrust "tying" law, 531 F. 2d 1211 (1976), cert. den.

429 U.S. 823 (1976). The Third Circuit did not disturb Judge Becker's rejection of alternative methods of adjudication wherein he strongly endorsed the public interest purpose of Rule 23, and stated as follows:

> As we analyze the case in terms, of the *Katz* criteria, the alternative methods of adjudication of each class issue are a multitude of duplicative, expensive and time consuming suits. Conversely, the class action approach represents a fair and efficient accomodation of the interests of the plaintiffs, the potential class members, as well as the defendant, which will have the multifarious claims against it adjudicated in one lawsuit. While the litigation will be onerous to this Court and to counsel, the total burden on the judicial system will be less than in the case of a series of protracted suits against the defendant. Finally, we believe the public interest will be served by a class adjudication. As the Court of Appeals noted in *Hackett v. General Host Corp.* (1972 Trade Cases para. 73,800), 455 F. 2d 313,623 (3rd Cir. 1972): 'The chief policy argument in favor of a hospitable attitude toward such class actions is that they tend to reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement. Viewed in this light the revised Rule 23 may be seen as an extension by the Supreme Court, acquiesced in by Congress, of the deterrent policies of such statutes as Sec. 4 of the Clayton Act.' *Ungar, supra*, 149-150.

4. *THIS COURT'S DECISION IN ILLINOIS BRICK MAKES IT CLEAR THAT THE CRUX OF*

PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS IS NOT INDIVIDUAL DAMAGE.

The Fourth Circuit says that the "gravaman of the Complaint is not the conspiracy; the crux of the action is injury, individual injury." (App. A, p. 10a). Again, in fn. 3, the Circuit Court cites *Illinois Brick* and says "that conspiracy to violate is not the crux of the private action." (App. A, fn. 37, p. 22a). That is an egregious misunderstanding of the result reached in *Illinois Brick* for reasons given as follows:

First, this Court recognized it was "elevating" those who deal directly with the violators "to a preferred pòsition as private attorneys general." *Illinois Brick, supra* at 725. The Tobacco Farmers here were direct sellers to the Tobacco Companies, and as such are elevated to a preferred position in invoking Rule 23 in their favor. Especially is this true where certification has been denied on the slim thread of lack of an "easy formula" for determining individual damages. (App. A, pp. 24a and 25a).

Second, Illinois Brick expressly recognized that those individuals "actually injured" may be denied recovery and that those who do recover may well have passed it on and then some, *supra* at 725. Proof of individual damage is *not* the crux of the action now under *Illinois Brick*. Damage is assumed thereunder for those who deal directly with the violators. The expressed basis for the result behind *Illinois Brick* is to facilitate private enforcement by removing complicated "pass-on" proof of individual damages from the courtroom. The Tobacco Farmers are elevated and preferred under the holding in *Illinois Brick*, and Rule 23 should facilitate, not inhibit, their recovery from the violators. In contrast to the direct-selling To-

bacco Farmers here, the Court for the Northern District of Texas, Dallas Division, has very recently dismissed under *Illinois Brick*, cattle farmers who were held to be indirect sellers to defendant supermarkets. *In re Beef Industry Antitrust Litigation*, MDL Docket No. 248.

Third, the Circuit Court cites pre-*Illinois Brick* articles by Milton Handler on the importance of individual damages, but those are outdated and inapplicable. The Circuit clearly has not understood the result of *Illinois Brick* and has ignored the fact that the Tobacco Farmers as direct sellers are merely on the other side of *Illinois Brick*. The result of *Illinois Brick* clearly pushes to the forefront the policy of Section 4 to deter violators and deprive them of the fruits of their illegality. Accord, *Developments-Class Actions*, 89 Harv. L. Rev. No. 7, 1318, 1536 (1976), *supra* at 725. If the class is not certified here, the Tobacco Companies will forever keep the fruits of their illegality garnered from the 19,994 absent Tobacco Farmers whose damage recovery will be barred as the statute of limitations runs.

5. *THE INTERTWINING OF LIABILITY WITH INDIVIDUAL DAMAGES CONFLICTS WITH OTHER CIRCUITS AND DEFEATS THE PURPOSE OF RULE 23 AND PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS.*

Both the District and Circuit Courts below bought the "red herring" argument which was adroitly exposed and repudiated by the District Court in *In re Master Key Antitrust Litigation*, 70 F.R.D. 23, 26 (D. Conn. 1975), denied review 528 F. 2d 5 (2d Cir. 1975), where Judge Blumenfeld in footnote 3 said as follows:

> The defendants argue that there is no liability without injury, and that a crucial element of the plaintiffs' case will, therefore, be proving damage. The argument continues: as the complexities of showing damage to each plaintiff are involved at the liability stage, it may be seen that common issues do not predominate even as to this portion of the case.
>
> I believe this classic defense argument, cf. 'Eisen IV, Class Actions One Year Later,' 711 ATRR, Apr. 29, 1975, at B-1, B-4, to be a red herring, notwithstanding its acceptance by some courts. See, e.g., In re Transit Co. Tire Antitrust Litigation, 1975 TRADE CASES 60, 144 (W.D. Mo. 1975), at 65, 418-19. If the plaintiffs introduce proof (or if it may be stipulated) at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supracompetitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff. The amount of that injury may be computed at a separate trial on the damage issues.

In the Southern District of New York, Judge Frankel has recognized and disparaged this red herring argument in *Shelter Realty Corp. v. Allied Maintenance Corp.*, 1977-2 Trade Cases para. 61,691 p. 72,829, and said as follows:

> If defendants' argument were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and

> has not been readily embraced by the various courts confronted with the same argument.

Judge Chapman's "crucial finding" was that insurmountable difficulties would be encountered if the case was litigated as a class action. (App. C, p. 65a). determinations would be just as great. Counsel for damages would "require thousands of individual determinations" to be coupled with "voluminous transaction data"; so he was convinced the action was unmanageable (Cir. App. 188). On this he erred against rather than in favor of the class action as directed by *Esplin, supra.* It is bewildering to read his comments later on in his opinion where he said the now absent Tobacco Farmers could intervene as named plaintiffs. If they all did this the damage determinations would be just as great. (Counsel for defendants admitted this in oral argument. (Cir. App. 79 L. 16-24 and App. 80 L. 1-5). Yet Judge Chapman said such mass intervention was not an unrealistic statement in view of the widespread publicity this case has received from its inception. It is naive to believe, as Judge Chapman suggests (App. C, p. 73a), that a "sharecropper" might intervene, because he would have to seek out and retain his own counsel and then be amenable to all discovery and other demands of defendants as the litigation progresses. This is an abuse because it attempts to rewrite Rule 23; the effect is to require the absent class members to opt in rather than opt out. See *Stavrides v. Mellon Bank N.A.*, 69 F.R.D. 424, 437 (W.D. Pa. 1975) where that court certified an antitrust class and said:

> A class action here is definitely preferable to a consolidated trial with the prospect of massive intervention or the separate trial of each of the

> named plaintiffs' claims.

Rather than attempting to rewrite Rule 23 as Judge Chapman has tried to do by requiring the "opt-in" procedure via mass intervention, the policy behind Rule 23 begs giving it effect. To require otherwise puts the Fourth Circuit in conflict with the Tenth circuit in *Esplin v. Hirshi, supra,* cited by this Court in *United Air Lines, supra,* fn. 14. The Fourth Circuit was not swayed by the judicial restraint exercised by the Fifth Circuit where it said in *Miller v. Mackey International, Inc.*, 452 F. 2d 424, 428 (5th Cir. 1971) that, "This Court cannot, however, rewrite the Federal Rules of Civil Procedure and seriously undermine the class action device."

This Circuit is in dramatic conflict with the Ninth Circuit's antitrust opinion in *Knutson v. Daily Review, Inc.*, 548 F. 2d 795, 811, cert. denied 97 S. Ct. 2977 (1977) (9th Cir. 1976) where that Court noted the close intertwining of *fact* of damage with causation but distinguished proof of fact of damage from proof of amount and made a detailed analysis of this Court's opinions applicable and concluded with the statement that: "The assumption merely amounts to a recognition that a 'restraint' in fact restrains." *Knutson, supra* at 812. *Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 561 (1931). See also *Presidio Golf Club v. National Linen Supply Corp.*, 1976-2 Trade Cases para. 61,221 (N.D. Cal. 1976), where the Court considered and answered every question raised by Tobacco Companies favorable to the position of the Tobacco Farmers.

> Contrary to defendants' contention, part of plaintiffs' prima facie case will not require proof that overcharges were imposed upon the rental of each item rented to plaintiffs. '[T]he impact

element necessitates only an illustration of generalized injury.' In re Sugar Antitrust Litigation, supra at 36, and cases cited therein. To hold otherwise would permit sophisticated conspirators, who agree to fix prices but cloak the implementation of such an agreement in complex formulae and price differentials, to run afoul of the antitrust laws with impunity. Such a potential hiatus in enforcement of the antitrust laws is not to be countenanced. *Presidio, supra*, page 70,630.

Similarly, interpreting the law of the Fifth Circuit, is the recent opinion of *Campus Cleaners, Inc. v. Dallas Tailor and Laundry Supply*, 1977-2 Trade Cases, Para. 61,714 (S.D. Tex. 1977).

6. *BOTH THE CIRCUIT AND DISTRICT COURTS RULE THE CLASS ACTION UNMANAGEABLE FOR LACK OF AN "EASY" DAMAGE FORMULA YET THEY BOTH APPLIED THE TRADITIONAL BEFORE AND AFTER ANTITRUST DAMAGE FORMULA TO CALCULATE EASILY DAMAGES FOR THE PLAINTIFFS.*

Both the Circuit and District Courts say no easy or workable formula for determining individual damages is shown, (App. A, pp. 24a and 25a; App. C, p. 63a) but each with a stroke of the pen easily calculates individual damages for the named plaintiffs. (App. A, p. 18a, fn. 31; App. C, p. 72a and 73a). Incongruously both then "bootstrap" this position and argue that there is no "death knell." Both Courts are not as naive as they would appear to be. The hidden reason behind this argument is their desire to save time by denying justice to almost all of the injured

Tobacco Farmers. Judge Chapman noted during oral argument the existence here of the classic before and after formula for calculating damages (Cir. App. Vol. I, p. 87, lines 4-8) after having noted it was claimed to be ten cents a pound (Cir. App. Vol. I, p. 17 lines 6-7). The Complaint had alleged damages at ten cents per pound times the number of pounds sold (Cir. App. I, p. 3-4 para, 8-9 et seq.). That is the classic antitrust damage formula and to deny class certification by saying there is no "easy formula" belies the real reason behind the denial which was an obvious capitulation to the "terror tactics" of the Tobacco Companies.

The Tobacco Companies have raised a great dust cloud of statistics and the spectre of multitudinous individual damage determinations for the obvious purpose of convincing the court that neither fact of damage nor amount of damage can be proved. This, too, is another red herring. Not only have the Tobacco Companies failed to refute the applicability of the classic "Before and After" damage formula already put forward by Tobacco Farmers, but their own brief below reinforces plaintiffs' position. They conceded that tobacco prices rose dramatically, particularly during the six week period in 1974 following the filing of this suit. (Df. Cir. Br., p. 18). When defendants deposed Robert M. Floyd he testified, "... I know that within just a few days after this lawsuit was filed that prices did take a dramatic increase." (Cir. App. 808, L. 21-22). It is interesting to note that the Tobacco Companies have not only paraphrased Mr. Floyd but have accepted his assertion that there was in fact a dramatic price increase following within several days upon the filing of the suit. (Df. Cir. Br. 18). Judge Chapman noted this price increase when commenting on plaintiffs' position. "The only thing

they got into that they say indicates a conspiracy is the fact that the prices all went up *after the lawsuit was brought...*" (Cir. App. p. 87, L. 4-6). (Emphasis added).

Discovery on the merits, which has been barred to date (Cir. App. Vol I, p. 71, L. 10-15), may additionally substantiate the before and after arithmetic of the ten cents per pound allegation. The exact details of the operation of the conspiracy vis-a-vis the practice of tied bids with attendant allocations is largely in the hands of the conspirators. This Court has noted that in complex antitrust litigation, "...[T]he proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot..." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). If the "easy formula" lies within the secret knowledge of the Tobacco Companies, then the class action should go forward and the violators should not benefit from their secrecy. See Judge Chapman's own remark about a meeting somewhere up in "the Adirondack Mountains." (Cir. App. Vol. I, p. 82, L. 14-17). The policy of this Court should be to discourge antitrust conspiracies, not reward them.

7. WHEN THE FOURTH CIRCUIT HOLDS THERE WOULD HAVE TO BE A DELUGE OF MINI-JURY TRIALS ON INDIVIDUAL DAMAGES, IT CONFLICTS WITH THE SECOND AND SEVENTH CIRCUITS AND PRESENTS AN IMPORTANT QUESTION TO BE DECIDED BY THIS COURT.

The Fourth Circuit is in conflict with the Second Circuit on the issue of individual jury trials for damages. The Fourth Circuit says that, "...[T]he court would be swamped by an overwhelming deluge

of mini-trials, in which the potential claimants would be entitled to a jury trial..." (App. A, pp. 13a and 14a). It should be noted that in its anxiety to justify its conclusion, the Circuit obviously misapprehends the appropriate procedures by using the word "claimants". It certainly must have meant "violators" for they only would benefit by demanding a jury trial for each claimant. The Second Circuit has expressed its view very clearly on this question in *In Re: Master Key Antitrust Litigation*, 528 F. 2d 5, 15 (2nd Cir. 1975) the Court said as follows:

> Appellants' final argument is that they will be prejudiced in their defense if the same jury does not hear both the liability and damage portions of the action. They also suggest that use of separate juries in those two trial might infringe their Seventh Amendment rights. Without in any way commenting on the validity of these arguments, we merely *note that they are wholly speculative* at this point. Judge Blumenfeld has indicated that one jury may hear both the liability and damage claims in this action. Cf. Swofford v. B. & W., Inc., 336 F. 2d 406, 415 (5th Cir. 1964), cert. denied, 379 U.S. 962 (1965). It would plainly be *premature* for us to rule on the appropriateness of using two juries where only one, in fact, may be involved. We should only note that bifurcated trials have frequently been employed with great success, (citations) *even in antitrust suits*, see Goldfarb v. Virginia State Bar, supra. (Emphasis added).

Similarly, the Seventh Circuit has refused to close the "door of justice."

To permit the defendants to contest liability

> with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent. *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 90 (7th Cir. 1941).

If *individual* jury trials are an indispensible essential, then, as a practical matter, antitrust class actions are dead.

The defendants fight the class so vigorously because they well know the importance of Rule 23 to effective enforcement of the antitrust laws. Any experienced antitrust judge will agree with this. Judge Wyzanski expressed this view during oral argument before the Panel. Judge Weinfeld expressed this view even where it applied to a large corporate class representative in *Du Pont Glore Forgon v. AT&T Co.*, 69 F.R.D. 481, 487, (S.D.N.Y. 1975), where he said, as follows:

> The sheer disparity of economic forces suggest the death knell of those claims if individual actions are required.

Judge Weinfeld's words show how unreasonable and unfair the approach of Judge Chapman is in his suggestion that the Tobacco Farmers can maintain separate actions on their own behalf or intervene in this suit. (App. C, pp. 72a, 73a). A third possibility Judge Chapman recognized is that, "...[E]ven if many small claimants are *effectively precluded from asserting their claims*, this is not a valid reason to ignore the provisions of Rule 23" (App. C, p. 74a).

The anomaly of this statement is apparent when contrasted with an earlier observation by Judge Chapman that, "The present case does not represent a situation that exists in many class actions where denial of the class sounded 'death knell' to the claims of the named plaintiffs and the class as a whole." (App. C, p. 72a).

A recent comment entitled *Antitrust Violations - Class Actions*, exposes the real motive of Tobacco Companies who, in resisting class certification, reject the protection of *res judicata* under Rule 23 (c) (2)B.

> *COMMENT: Defendants have apparently not sought to avail themselves of this theoretical benefit, and it has been suggested that this theoretical benefit is illusory to the extent that *claims other than that of the representative party would be barred by the statute of limitations* or be unlikely to be presented if no class action were maintained. 6 ALR Fed. 19,53. (Emphasis Added).

The above annotation concludes with the following comment of particular prescience of what might occur by reason of Judge Chapman's inviting mass intervention and the Circuit adopting one-way intervention:

> *COMMENT: It would appear that in the above case many of the court's objections to the maintenance of a class action constituted a general attack upon the new procedures established by Rule 23 as amended in 1966; that such objections were not limited to the applicability of Rule 23 to the particular facts of the instant case; and that similar objections would be applicable to virtually all class action proceedings

while Rule 23 was designed to authorize. In any event, several months later, after many additional plaintiffs had joined the action, and after more than 40 separate antitrust actions involving the same alleged conspiracy had been transferred to a different district pursuant to 28 USC 1407, a contrary result was reached in Illinois v. Harper & Row Publishers, Inc. (1969, DC Ill.) 301 F. Supp. 484, 6 ALR Fed. 1, *supra* 12b, 6 ALR Fed. 19, 59-60.

Even here the Fourth Circuit conflicts with the Fifth and the Eighth Circuits. The Fifth Circuit said in the case of *Jones v. Diamond*, 519 F. 2d 1090, 1099, (5th Cir. 1975) as follows:

> Far from being the scourge of modern jurisprudence, class actions contribute to its salubrity and vitality. The modern manifestation of the class action is an efficacious jurisprudential tool, whose applicability is neither universal nor monocentric.

A well respected antitrust Judge in the District Court in Minnesota considered the manageability of a large antitrust class under Rule 23 (b) (3) when he certified a class action in *Forbes v. Minneapolis Board of Realtors*, 61 F.R.D. 416, 417 (D. Minn. 1973). Appeal from the District Court was dismissed. 1973-2 Trade Cases, Para. 74,651, 94,858, (8th Cir. 1973). In *Forbes*, Judge Larsen said as follows:

> Rather, the Court shall state its broad view that Rule 23, in particular Rule 23(d), directly imposes upon the Court an *obligation to proceed with flexibility and imagination in structuring* the course of a class action. (Emphasis added).

8. *THE CIRCUIT COURT REPUDIATED THE ANTITRUST TRIAL EXPERIENCE OF JUDGE WYZANSKI IN FAILING TO FIND AN ABUSE OF DISCRETION BY A DISTRICT JUDGE WITH LITTLE ANTITRUST CLASS ACTION EXPERIENCE.*

Under heading number 3, *supra* pp. 18-20, it was pointed out that the Third and Ninth Circuits had adopted the opinion by Judge Charles E. Wyzanski, Jr. *viz: Bogosian v. Gulf Oil Corp., supra*, and *In re Sugar Antitrust Litigation, supra.* This conflict is discussed fully under that heading.

In deferring to the "greater familiarity and expertise" of the District Court (App. A, p. 9a), the Fourth Circuit rejects the trial court expertise of Judge Wyzanski, a well recognized trial judge in the field of antitrust law, and reveals its own lack of expertise in this area. In footnote 32 (App. A, pp. 18a and 19a) the Circuit Court denigrates his reliance on the public policy beamed from Section 5 of the Clayton Act, (*et seq.*), and says that collateral estoppel is a more potent argument in favor of the "test case route" following denial of class certification. (App. A, 18a and 19a, fn. 32). This approach indicates a blindness to the second half of Section 5; *i.e.* 5(a), now 5(i), which provides for a tolling of the statute of limitations during the pendency of the government action. The Fourth Circuit also conflicts with the Eighth Circuit which, like Judge Wyzanski, had seen the "cross light" of policy beamed from Section 5. *Armco Steel Corp. v. North Dakota*, 376 F. 2d 206, 210 (8th Cir. 1967). The record reveals that Judge Chapman has tried few, if any, antitrust actions and no cases where class action notices were sent out. Large antitrust class actions are indeed certified by well-

known experienced antitrust judges around the country; *e.g.* Judge Wyzanski, Judge Boldt, Judge Miles Lord, Judge Weinfeld, et al. Justice under Rule 23 for absent class members should not be defeated by the view of a Judge, inexperienced in the antitrust class action field, that the suit is unmanageable (App. A, p. 90a) or that there is no "easy formula" to calculate damages. (App. A, p. 24a). Antitrust violators should not get to keep the "fruits of their illegality", *Illnois Brick*, 52 L. Ed. 2d at 725, simply because the district where they happen to be sued assigns the case to a judge with little antitrust experience. Relief therefrom should be provided either by reassignment or by guidance from the Appeals Court as Judge Wyzanski did here for this inexperienced District Judge.

Judge Wyzanski believed that a court could readily manage this class action and pointed out the way to do it was by going forward on the overriding common core conspiracy issue. It is a reasonable inference that he sat on the Panel because of his antitrust class action expertise.

Trial judges in other courts, recognizing the trial experience of Judge Wyzanski, have relied on the Panel decision in *Windham* in other antitrust class actions. Judge Cannella in *Milonas v. Amerada Hess Corp.*, 1976-2 Trade Cases para. 61,069 at page 69,820 (S.D.N.Y. 1976) adopted and quoted from Judge Wyzanski's opinion for the Panel. Also Judge Bue in *Campus Cleaners, Inc. et al v. Dallas Tailor and Laundry Supply, supra* at pages 72,916 through 72,918, cites with approval the Panel decision.

It has been authoritatively stated by legal scholars that manageability concerns *per se* should be reoriented in affirmative terms "as an obligation imposed upon courts to look for the least cumbersome class procedures." *Developments - Class Actions*, 89 Harv. L. Rev. 1318, 1504 (1976). An earlier comment, to the same effect, is as follows:

> As many commentators point out, the short four-year statute of limitations, 15 U.S.C. §15b [1970], together with the often protracted nature of antitrust litigation, makes chances of a treble damage suit being filed after an earlier one has been completed quite small. See, eg. In re Master Key Antitrust Litigation, 1973-2 Trade Cases, Para. 74,680 at 94, 979 [D. Conn. 1973]; Berger and Bernstein, supra note 11, at 875. *Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 224 fn. 26 (Nov. 1977).

Concern with the effect of the resoluteness of a trial judge to make an antitrust class action manageable is reflected in the Hearings before the "Subcommittee on Antitrust and Monopoly" of the United States Senate Judiciary Committee in July and September, 1977. John H. Shenefield, Acting Assistant Attorney General, Antitrust Division, Department of Justice testified in response to questions as follows:

> MR. SHENEFIELD. I am happy to be able to report that the office for the Improvement of the Administration of Justice, under Professor Meador of the University of Virginia Law School, is working toward not only rehabilitation or revision of Rule 23 of the class action procedures, but looking toward the wholesale revision of the Federal rules to make, as Judge Bell told you in the oversight hearings, our judicial system more efficient and more responsive.

I gather that Chief Justice Burger is making the same effort.

I have one additional point that I think might be made in this connection. There is no substitute for a judge who is determined to reach justice and who is determined to do so by the shortest line between his present position and that end. A judge in remarkably efficient manner, if he is determined to do so, can take control of the litigation and make the procedure a manageable one even under the existing rules. *Hearings on Fair and Effective Enforcement of the Antitrust laws*, S. 1874, July 21, 22 and September 9, 1977, p. 23.

Judge Frankel of the Southern District of New York recently took on management of an antitrust class action in *Shelter Realty Corp. v. Allied Maintenance Corp.*, 1977-2 Trade Cases para. 61,691, p. 72,830 (S.D.N.Y., 1977). With regard to the resoluteness with which a trial judge should approach the questions of manageability, he said as follows:

> This court joins with the numerous judges and commentators who have deprecated the idea of blocking class suits on threshold predictions of unmanageability. The position was aptly expressed by Judge Coffin in Yaffe v. Powers, 454 F. 2d 1362, 1365 (1st Cir. 1972):... .

In the same opinion, Judge Frankel cites and quotes from the *Manual for Complex Litigation*, Part I, section 1.43 N. 36 (rev. ed. 1973) as follows:

> Dismissal for management reasons, in view of the public interest involved in class actions,

> should be the exception rather than the rule.

The same caveat appears in the new revision (1977) of the Manual as footnote 72 and with even stronger supporting authority.

During oral argument, Judge Chapman seemed to be joining the judges and commentators referred to by Judge Frankel when he said as follows:

> Well, I think that's true, and that's the reason I was concerned about manageability. But the overriding issue about conspiracy or not conspiracy runs through all the claims. (Cir. App. Vol. I, p. 80, L. 6-9; and p. 82, L. 14-25 *et seq.*).

And in the same vein he stated, "They have got to prove the conspiracy; and if they prove it, *then manageability is a problem, but it's a problem that can be handled.*" (Emphasis added). (Cir. App. Vol, I, p. 83, L. 13-15).

The District Judge was affected by the "terror tactics" of the Tobacco Companies to the extent that he shunned proceeding with a class action. The echoes of the "terror" argument reverberate through the Circuit Court opinion when it speaks of being "swamped by an overwhelming deluge of mini-trials" (App. A, p. 13a-14a); which might "consume ten years of its time", (App. A, p. 19a), and (App. C, p. 69a-70a). There is nothing in the record itself to substantiate this exaggerated notion of the amount of time which determination of this class action would require. Nor does it represent the factual base upon which the sound discretion of the District Judge might stand.

The possibility of the degeneration of the lawsuit

into unmanageable mini-trials has been dealt with in articles by legal scholars, one of which sees no danger which the District Judge envisioned.

> Antitrust conspiracy actions present a significant opportunity to realize the potential of rule 23 because they frequently involve prolonged, complex trials. The issues involved in such actions indicate that a class action will rarely fail to achieve the economies which justify its utilization. The existence and illegality of a conspiracy are the core of each class member's claim, and proof of the conspiracy issue will involve questions which do not vary among the class members. Consequently, class litigation of this issue is not likely to degenerate into separate trials by each class member. Furthermore, a class action seems a superior method for litigation since the bulk of the claims can be concentrated in one forum where the court has broad powers to administer the action. Intelligent application of the court's discretion can guarantee an efficient resolution of the claims, and rule 23 provides the means to ensure fair treatment of the interests of absent class members. *Litigating the Antitrust Conspiracy under Amended Rule 23*, 54 Va. L. Rev. No. 2, March 1968, 314, at 326.

District Judge Chapman revealed his chief reason for denying the class in a colloquy with counsel for the Tobacco Farmers during final argument, as follows:

> THE COURT: Well, that would be on the merits. Let me ask you a question. You say you represent a very small geographic area of seven

> counties where tobacco is grown in South Carolina. If I certify your class, don't you think that Judge Dupree is immediately going to unload the whole tobacco case on me, the other three states?
>
> MR. ZEIGLER: Judge, I don't think so. (Off the record.)
>
> THE COURT: As soon as I certify a class, if I certify a class in this case, he's going to write to Judge Murrah, of the Multidistrict Panel, and say, "Why try the tobacco cases twice" Let's try them once down in Florence," and that's going to be the end of it for him.
>
> MR. ZEIGLER: I don't know Judge Dupree that well, your Honor.
>
> THE COURT: I would do the same thing to him.
>
> MR. ZEIGLER: Well, do it to him first, your Honor, and send it up there. Show that we are only a small segment and it should go to the larger end, and not have the tail wagging the dog.
>
> THE COURT: No, he's going to take the position that we have been in it a year and he's just got in, so you are not going to have seven counties; you are going to have four states.
>
> MR. ZEIGLER: But, of course, your Honor is assuming that we will prevail in the North Carolina case, and there are many hazards in that.

THE COURT: You mean you think that if there was a conspiracy, it only operated in South Carolina?

MR. ZEIGLER: No, there are other things that you have to consider; and quite honestly, your Honor, in all candor, when I initially drew this complaint and read the *Eisen* case, I was struck with the fact that I had to do what I thought I could manage alone, representing these people; because, as I read the *Eisen* case, it had to be a manageable group, and you had to have sufficient logistical power as counsel to guide this group. I don't regard myself as any new Moses or anything, but it's like coming up against Pharaoh and his army when you start something like this. And I knew these seven counties; I know these people are a homogeneous group; I know these tobacco warehouses; and I know this is a manageable group of people in this kind of case. And at that moment, I stood alone; I didn't know what I was getting my teeth into, frankly, but that was the real reason we cut off this segment, because my reading of the *Eisen* case was that we needed to do that, in order to do just what your Honor said, to make it a manageable area, a manageable group with typical people in this group. Now, with a larger array of talent mustered for the plaintiffs, I can see that the other case can be manageable, but I don't think your Honor should say that the one reason for not certifying the class here is the fear that Judge Dupree might dump that large burden on your Honor. I just don't think —

THE COURT: I was just saying that you have always talked about a small, manageable,

seven-county area; and you have gone to North Carolina and brought a suit covering three other states, and somebody is going to wind up with the whole case, because I am sure that the Multidistrict Panel is going to assign it to one judge and he's going to handle it all.

The Tobacco Farmers of South Carolina should not be denied class action relief by Judge Chapman simply because of speculation as to what some other District Judge or Multidistrict Panel may "unload" on him. The Multidistrict Panel exists for judicial economy and is known to make transfers only to receptive judges with sufficient expertise to manage the consolidated litigation in the public interest of judicial economy.

CONCLUSION

Not infrequently and not without reason, this Court is currently being accused of "closing the courthouse doors" to the ordinary citizens of this country. Petitioners, as ordinary citizens who happen to be farmers, sharecroppers and tenants, have dared to challenge some of the most powerful corporations in this nation. After an exhausting three and one half years of litigation on the procedural issue which alone can make their cause viable, they are knocking on the courthouse door of the highest court in the land. This Court has the opportunity to show that it means what it says; the opportunity to strengthen what it recently proclaimed, that private enforcement of the antitrust laws, through effective application of Rule 23, is like a magna carta for the ordinary citizen liberating him from economic serfdom. If this petition is not granted, then the last state of the ordinary man is

worse than his first. He is left with a doubly ambiguous situation. The decisions of this Court in *American Pipe* and *United Air Lines* will have been effectively reversed by a Court of Appeal and the Courts of Appeal will give different relief and varying qualities of justice in administering the same law.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 75-2315

Roy P. Windham, Harden Evans, Joe Skipper, David Nexsen, W. A. Turner and Toby Gaskins, *Appellants*

versus

American Brands, Inc.; Liggett & Myers, Inc.; R. J. Reynolds, Inc., (R. J. Reynolds Tobacco Co.); Brown & Williamson Tobacco Corporation; The Imperial Tobacco Company (of Great Britain and Ireland) Ltd.; Mullins Leaf Tobacco Company, Inc.; C. W. Walters Company, Inc.; Export Leaf Tobacco Company; Loews Theaters, Inc., d/b/a Lorillard); Philip Morris, Inc.; Universal Leaf Tobacco Company, Inc.; The Austin Campany, Inc. (Greenville, Tenn.); J. P. Taylor Company, Inc.; Dibrell Brothers, Inc.; and Earl L. Butz, Secretary of Agriculture of the United States, *Appellees*

On Rehearing En Banc

(Argued: February 14, 1977. Decided: Oct. 11, 1977)

Before Haynsworth, Chief Judge, Bryan, Senior Circuit Judge, Craven,* Butzner, Russell, Widener and Hall, Circuit Judges, en banc.

E. N. Ziegler (Page Dees; John A. Cochrane and John E. Thomas; J. Nat Hamrick; Robert C. Howison, Jr.; and Frank M. Wooten, Jr. on brief) for Appellants; Murray Bring (Arnold and Porter on brief) for Appellee Philip Morris Incorporated; (Willcox, Hardee, Palmer, O'Farrell, McLeod & Buyck on brief) for Appellee Philip Morris Incorporated; Robinson, McFadden, Moore & Pope; Davis Polk & Wardwell on brief) for Appellee R. J. Reynolds Tobacco Company; Raymond W. Fullerton, Attorney, U. S. Department of Agriculture (James D. Keast, General Counsel; Harold Carter, Assistant General Counsel; John C. Chernauskas, Director Marketing Division; Edward M. Silverstein, Attorney, Marketing Division, Office of General Counsel, U. S. Department of Agriculture on brief) for Appellee Secretary of Agriculture of the United States; (Mark W. Buyck, United States Attorney; Wm. Reynolds Williams, Assistant United States Attorney on brief) for Appellee Secretary of Agriculture of the United States.

*The opinion in this case was not prepared until after Judge Craven's death.

RUSSELL, Circuit Judge:

This is an interlocutory appeal, pursuant to Rule 54 (b), Fed. R. Civ. P., from an order denying class certification under Rule 23 (b) (3), Fed. R. Civ. P., in a private action brought by certain South Carolina tobacco growers, who allege that the defendant tobacco companies and the Secretary of Agriculture violated Sections 1 and 2 of the Sherman Anti-trust Act [1]

1 15 U.S.C. §§ 1 and 2.

during the years 1970 through 1974.[2] When the appeal was initially heard, the majority of the panel thought that the district court should have allowed the suit to proceed as a class action, at least on the issue of "violation."[3] However, we now conclude that the denial of class certification was not an abuse of discretion on the part of the district court. We therefore affirm.

This action concerns the sale at auction of flue-cured tobacco on the South Carolina markets. Flue-cured tobacco is a non-standardized or non-fungible commodity. It is raised in the Pee Dee section of South Carolina. Under a long established pattern of marketing, it is sold, when ready for market, at auctions conducted at some 36 warehouses in 11 geographic markets distributed throughout that section. All tobacco, before being offered for sale at auction, must be graded by government inspectors for the information of both sellers and buyers. These inspectors classify the tobacco within the rage of 161 grades, depending upon the location of the leaf on the tobacco stalk, beginning with the top of the plant. Every buyer, however, has his own grading system. His classifications of grades are considerably less than those used by the government inspectors and vary from 10 to 32.

All tobacco is grouped, according to government

2 The district court's opinion is reported at 68 F.R.D. 641. For a comment on this opinion, see Note, **The Predominance Requirement: Antitrust Class Actions and the "Commercially Unique" Product**, 27 **Syracuse L. Rev.** 1257 (1976).

3 The panel majority's opinion, along with Judge Bryan's dissent, is reported at 539 F. 2d 1016. For a critique of the majority opinion, see 62 **Cornell L. Rev.** 1 (1977).

grades, in individual piles weighing approximately 200 pounds each, and is offered for sale by an auctioneer at competitive bidding. The warehouses where the tobacco is brought, graded and sold are owned by independent individuals or concerns having no connection with the defendants. The auctioneer at the sales is employed by the warehouses and likewise has no connection with the defendants. Under the established procedure for bidding, a representative of the warehouse (known as a "starter") begins the bidding as each pile is offered for sale at the warehouse and the auctioneer proceeds from that point to receive bids in the normal auction manner from the prospective buyers present at the sale.

The defendants are buyers of flue-cured tobacco. Some purchase tobacco at all of the warehouses in the several South Carolina markets; others participate in the sales at only some of such markets and warehouses. There are other buyers than the defendants who are present and bidding at some or all of the South Carolina markets.

The prices which prevail at the auctions vary from day to day and are not uniform, even for tobacco which may be graded alike by government inspectors. Normally, these prices increase as the season progresses. To some extent this is because the early marketing generally consists of the lower grades commanding lower prices. As the marketing season continues, the grades generally increase in quality and market demand. Because of short supply, the price range between the lower and higher grades, however, had narrowed in the 1970's, which is the period involved in this lawsuit. Thus, in 1970, the average price on the South Carolina markets was 71.88 cents per pound; in 1974 it was 103.96 cents.

Just as there is a variation in price from market to market, from day to day, and from governmental grade to governmental grade, and even among grades, during a season, so there may be a considerable variation in the governmental grades for which the various buyers compete and in the quantities purchased by the different buyers from day to day on the various markets. Some buyers, for instance, do not bid on certain grades, because their principals do not use such grades in their processing, or they may already have purchased as much as they wish of those grades at that particular market. In such cases, the buyers either withdraw from the bidding or sharply curtail their bidding. An illustration of this situation is the experience at the Pamplico market during the marketing season of 1973. One of the defendants did not buy any tobacco at this market in 1973; another did not buy during a quarter of the sales days at such market in this period. A further indication of the fluctuations in purchases at this market is evidenced by the record of purchases during this same 1973 season by the defendant Reynolds at this market. Its percentage of purchases, on a daily basis, fluctuated widely between 1 per cent and 27 per cent of the sales. It is interesting, too, that the largest buyer at the market during that season, is not a defendant in this action.

At the bidding, it was not infrequent that the warehouseman would intervene to bid up the price of a particular pile of tobacco. He would do this to "stabilize" the market, as one warehouseman phrased it, that is, to stimulate the bidding. Should a seller, on the other hand, feel that his tobacco was being sold too cheaply he could withdraw it from sale and later reoffer it or put it under the support loan program to the Stabilization Fund, operated under the authoriza-

tion of §1445, 7 U.S.C. From time to time, the bidding for a particular pile of tobacco, particularly if of high quality, would end with a tie-bid from two or more of the buyers. Occasionally, this tie-bid might be broken by another buyer, who would intervene with a higher bid. More often, though, the auctioneer would, in case the tie was not broken, make a choice between the bidders and award the tobacco to one of the tie-bidders. In selecting the tie-bidder to whom to assign the tobacco, the auctioneer would in many cases favor the bidder who had bid higher on the lower quality tobacco at that warehouse. The plaintiffs have disclaimed any intention of charging that the auctioneer participated in any way in any conspiracy to fix prices or to allot the tobacco according to any plan or agreement among the buyers; his complete impartiality is conceded. [4]

In their complaint seeking both individual and class relief, the plaintiffs set forth three separate causes of action under the anti-trust laws: The first asserted a conspiracy of the defendant companies, "with the knowledge, consent and acquiesence" of the Secretary of Agriculture to fix prices and rig bids on flue-cured tobacco at the South Carolina tobacco auction markets; the second, a conspiracy of the defen-

4 The plaintiffs describe tie-bidding in their brief as follows:

"***Tied bidding is a system by which buyers for the tobacco companies bid the same price for the tobacco offered on the market thereby tying the bid, and then receive a portion of the offerings by allocation."

This is inaccurate insofar as it suggests that the auctioneer makes his allocation pursuant to any conspiracy. As we have said, the record is clear and conceded by the parties that the auctioneer acts with complete impartiality and without any agreement with any defendant in choosing the successful bidder in connection with tied bids.

dant companies, "with the knowledge, consent and acquiescence" of the Secretary of Agriculture, to monopolize these same markets by percentage purchase agreements and collusive bidding; and, finally, in conjuction with the Secretary of Agriculture, a conspiracy "to fix, control, and restrict" unreasonably "the amount of flue-cured tobacco which could be sold per day and per week in the auction warehouses," primarily by an inequitable assignment of inspectors to such warehouses as opposed to those assigned to warehouses in the Georgia market. To this complaint, all parties filed answers. In addition, the Secretary of Agriculture moved to dismiss but the motion was denied.

After joinder of issues, the plaintiffs moved to certify the action as a class action under Rule 23. Before passing on the certification issue, the district judge permitted full discovery on that issue alone, presided at the depositions of more than twenty witnesses heard during that discovery, and examined extensive documentary evidence produced.[5] On the basis of the record thus developed, he filed a comprehensive opinion containing what was described in the

5 In **Doctor v. Seaboard Coast Line R. Co.** (4th Cir. 1976) 540 F. 2d 699, 707, we said, quoting from **Huff v. N.D. Cass Company** (5th Cir. 1973) 485 F. 2d 710, 713:

"'***The court may, and often does, permit discovery relating to the issues involved in maintainability, [of the action as a class action] and a preliminary evidentiary hearing may be appropriate or essential as a part of the vital management role which the trial judge must exercise in class actions to assure that they are both meaningful and manageable.'"

See, also, Neely v. United States (3d Cir. 1976) 546 F. 2d 1059, 1071:

"***Before a ruling is made denying class action certification on unmanageability grounds, hard data should be presented to the district court as to the actual difficulty--or ease--involved in determining class membership and managing this proceeding."

panel opinion as "full, precise, and apposite findings." In these findings, he concluded that the plaintiffs had not borne their burden,[6] that while the standards of Rule 23 (a) for class certification had been satisfied the requirements of 23 (b) (3) that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that a class action would be "superior to other available methods for the fair and efficient adjudication of the controversy" were not satisfied. Included as a part of his findings under 23 (b) (3), was the finding that, if certified as a class action, the action would become unmanageable, because of the complexity of proof of injury and damage. For those reasons, he concluded that the

6 It is well settled in this jurisdiction that the proponent of class certification has the burden of establishing the right to such certification under Rule 23. **Doctor v. Seaboard Coast Line R. Co., supra,** 540 F. 2d at 706; **Carracter v. Morgan** (4th Cir. 1973) 491 F. 2d 458, 459, **Poindexter v. Teubert** (4th Cir. 1972) 462 F. 2d 1096, 1097.

The panel opinion stated that there was "almost a rebuttable presumption" in favor of class action treatment for anti-trust suits. 539 F. 2d at 1021. This rule, if adopted, would operate to remove the burden of establishing right to class action treatment from the plaintiff in an anti-trust suit and impose it on the defendant or defendants. This would place anti-trust suits in a preferred position over even plaintiffs in discrimination cases. **Cf., East Texas Motor Freight System, Inc. v. Rodriguez** (1977)_____U.S._____, pp. 3-4 slip opinion, U.S.L.W. We do not find this proposed rule supported by either authority or reason and do not adopt it. For a criticism of this panel ruling, see, 62 **Cornell L. Rev.** at 5-7.

7 Rule 23 (b) (3) sets forth four nonexclusive factors to be considered in making findings on predominance and superiority:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or understandability of concentrating the litigation of the claims in the particular forum; (D) **the difficulties likely to be encountered in the management of a class action.**" (Emphasis added)

standards for certification as set forth in (b) (3) of Rule 23 could not be met and he denied certification.

Primarily, the decision of the district judge turned upon a finding of the unmanageability of the action as a class action considered under the requirements of Rule 23 (b) (3). In any review of either a grant of denial of class certification on grounds of manageability under Rule 23 (b) (3), we must begin by recognizing the firmly established principle that the issue of manageability of a proposed class action is always a matter of "justifiable and serious" concern for the trial court and peculiarly within its discretion.[8] This is so because the issue is one of fact, subject to determination by the district court; it is "a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discre-

See, also, ibid. 27 **Syracuse L. Rev.** at 1261, n. 26: "Predominance and superiority are considered jointly in assessing the manageability of actions under rule 23 (b) (3)."

8 **Link v. Mercedes-Benz of N. Am., Inc.** (3d Cir. 1977) 550 F. 2d 860, 864 (U.S. appeal pending).

See Note, 62 **Carnell L. Rev.** at 4:

> "Whether the individual issues in a given class action are so extensive as to render the case too combersome for the court is a matter that rests in the discretion of the trial judge."

To that effect: **Barnett v. W. T. Grant Company** (4th Cir. 1975) 518 F. 2d 543, 547; **Cypress v. Newport News General & Nonsectarian Hosp. Ass'n.** (4th cir. 1967) 375 F. 2d 648, 653. And **see** Frankel, **Some Preliminary Observations Concerning Civil Rule 23,** 43 F.R.D. 39 (1967):

> "***It [Rule 23] is neither a set of prescriptions nor a blue print. It is rather, a broad outline of general policies and discretions. ***it confides to the district judges a broad range of discretion."

tion."[9] And this is particularly true in actions governed by Rule 23 (b) (3).[10] Accordingly, the plaintiffs in this appeal have the burden of establishing that the exercise of discretion by the district judge in denying, as he did, class certification was clearly wrong.

It must be borne in mind, too, that there are three essential elements in every private anti-trust action: They are (1) a violation of the anti-trust law, (2) direct injury to the plaintiff from such violations, and (3) damages sustained by the plaintiff.[11] It follows, therefore, that a mere finding of violation does not result in liability. The statute gives a right of action only to the extent that one has been "injured in his business or property by reason of anything forbidden in the anti-trust laws."[12] The gravamen of the complaint is not the conspiracy; the crux of the action is injury, individual injury.[13] While a case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are always strictly individualized.[14] As Professor Handler has aptly declared:

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9 **Link v. Mercedes-Benz of N. Am., Inc., supra,** 550 F. 2d at 864.

10 Rule 23, Fed. R. Civ. P., Advisory Committee's Note, 39 F.R.D. 98, 102 (1966).

11 **See, e.g., Zenith Corp. v. Hazeltine** (1969) 395 U.S. 100, **reversed on other grounds,** 401 U.S. 321 (1971); **Miller Motors, Inc. v. Ford Motor Company** (4th Cir. 1958) 252 F. 2d 441, 448; and **Kline v. Coldwell, Banker & Co.** (9th Cir. 1974) 508 F. 2d 226, 230-1, **cert. denied** 421 U.S. 263 (1975).

12 15 U.S.C. § 15; Handler, **Twenty-fourth Annual Anti-trust Review,** 72 **Col. L. Rev.** 1, 37 (1972).

13 **Burnham Chemical Co. v. Brax Consolidated** (9th Cir. 1948) 170 F. 2d 569, 571, **cert. denied** 336 U.S. 924 (1949).

14 It has been suggested that the two issues of injury and damage require a different standard of proof. Thus, Professor Areeda in

> "[The treble-damage remedy provided by Clayton Act § 4, 15 U.S.C. § 15] is . . . limited by its [own] terms, the only person who may recover damages is one who had been 'injured in his business or property by reason of' a violation. The amount of his recovery, except for costs, is limited to 'threefold the damges *by him* sustained.' The language that Congress used in this statute . . . leaves no room for awarding damages to some amorphous 'fluid class' rather than, or in addition, to one or more actually injured persons. It likewise does not permit any person to recover damages sustained not by him, but by someone else who happens to be a member of such class." (Italics author's) (p. 37).

Generalized or class-wide proof of damages in a private anti-trust action would, in addition, contravene the mandate of the Rules Enabling Act[15] that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." It follows that in determining manageability, the District Court must have in mind these essential elements of a private anti-trust action and the proof that may be required to establish these elements.[16]

"Antitrust Violations without Damage Recoveries," 89 Harv. L. Rev. 1127, 1128 (1976) states that Courts "will insist upon a greater degree of proof of the **fact** of injury than would suffice for proof of the **quantum** of damages." (Italics author's).

15 28 U.S.C. § 2072.

16 In addition to Professor Handler's article, **see Link v. Mercedes-Benz of N. Am., Inc., supra,** 550 F. 2d at 871-72 (Gibbons, Jr., dissenting from refusal to hear interlocutory appeal); **Kline v. Coldwell, Banker & Co., supra,** 508 F. 2d at 236, N. 8; **In re Hotel Telephone Charges,** (9th Cir. 1974) 500 F. 2d 86, 89-90; and **Eisen v. Carlisle & Jacquelin** (2d Cir. 1973) 479 F. 2d 1005, 1112-14 (Eisen III), **vacated on other grounds,** 417 U.S. 156 (1974). **But see In Re Sugar Antitrust Litigation** (E.D. Pa. 1976) 22 FR Serv2d 634, 662-68 and Note, **Developments in the law - Class Actions, 89 Harv. L. Rev.** 1318, 1532-36 (1976).

As we have already stated, the district judge carefully and thoughtfully reviewed the facts and concluded that the issue of anti-trust violation did not predominate, that class action treatment was not superior to other available remedies in the case and, under the required standards of proof of the plaintiffs' action, class certification would render it unmanageable. He referred to the multiplicity of claimants who might be involved, the complexity of their claims as they would relate to injury and damages, and the highly individualized character the proof of injury and damages would assume, making necessary a mini-trial in all the individual claims, probably with a separate jury. He noted the numerous potential parties that might be injected into the action by class certification. Parties to whom notice would have to be given if class certification were allowed would, it seems, be above 20,000. The sheer cost of preparing a list of these potential parties was estimated at $30,000. The claims of the parties would involve thousands upon thousands of sales during four separate annual marketing seasons. Moreover, the claims could not be proved by any set method of mathematical or formula calculation but would require individual proof and trial, necessitating the examination of countless invoices, warehouse records, etc. In some cases, the calculation might be complicated, the district judge found, by the need to allow off-sets against the claims.[17] This problem is also increased not simply by the necessity of individual proof and calculation but also by the variety of claims as asserted by the various plaintiffs themselves arising out of the several violations alleged by the plaintiffs. Some of the plaintiffs complain only of tie-bids in connection with the court's finding on price-fixing and would restrict their damage claim

17 That such an offset is appropriate in this connection, see Areeda, ibid., at 1136.

accordingly. They express no objection to the auction system as conducted except as it results in a tie-bid, which they criticize as illegal because the tie-bid improperly converts, in their opinion, the auction into an allocation system. Others would predicate a claim upon the fact that the same government grade of tobacco may have sold at auction at different prices. Still others find price-fixing because the prices bid do not allow properly for increased costs of production. The monopoly charge, on the other hand, had to do, it may be assumed, more with the relative quantities purchased by several defendants at either one market or at all markets as evidence going to establish an allocation of the product on some agreed basis. The third count dealing with an alleged conspiracy to restrict the number of inspectors at any warehouse, thereby impeding orderly sales of tobacco as it matured, would involve proof that, as a result of the delays in marketing occasioned thereby, the quality of the grower's tobacco, which, so far as quality is concerned, is a perishable commodity, deteriorated, and the grower was forced to sell his tobacco at depressed prices because of its reduced grade. There is, also, some basis for assuming, as did the district judge, that, in some instances at least, any alleged conspiracy would relate, not to the over-all market area but to a single market in the area. In calculating any potential party's claim, the court thus would be required not simply to consider his individual sales on an individual basis, but to relate those sales to one of the conspiracy violations alleged by the plaintiffs. Confronted with this congeries of both separate allegations of conspiracy violations and individualized claims of injury and damage, all intertwined, the district judge found that, if he certified this action as a class action, the court would be swamped by an overwhelming deluge of mini-trials, in which the po-

tential claimants would be entitled to a jury trial, and which would engage the time and attention of the court for years to come. He gave consideration to severance of issues but found that the resulting dilemma could not be resolved by any severing of issues. In view of the overwhelming nature of the individual claims and their complexity, he found, as we have said, that the issue of violation did not predominate nor was a class action a superior remedy in the case.[18]

The plaintiffs argue, however, that the district judge was "plainly wrong" in his denial of certification on the ground of manageability. In support, they assert that he rested his findings substantially on the difficulties of establishing injury and damages. Such a ground, in their view, will not justify a denial of class certification. There is no question, as they contend, that there are authorities which at least in result support this view.[19] On the other hand, there are equally respectable authorities in which certification of an anti-trust action was denied because of the complexity of, and the difficulties connected with, the proof of individual

18 **Cf. Newberry v. Washington Post Co.** (D.D.C. 1976) 71 F.R.D. 25,27:

> "***From a class point of view, damages are the preponderant objective of this treble damage jury action. Determination of a violation or violations of the Sherman Act establishes nothing automatically as far as the measure of individual damage claims is involved."

19 **Barr v. WUI/TAS, Inc.** (S.D. N.Y. 1975) 66 F.R.D. 109; **Weit v. Continental Illinois Nat. Bank & T. Co. of Chicago** (N.D. Ill. 1973) 60 F.R.D. 5; **Wainwright v. Kraftco Corporation** (N.D. Ga. 1972) 54 F.R.D. 532; **City of Philadelphia v. American Oil Company** (D.N.J. 1971) 53 F.R.D. 45; **State of Minnesota v. United States Steel Corporation** (D. Minn. 1968) 44 F.R.D. 559. Also **see In Re Sugar Trust Antitrust Litigation, supra,** 22 FR Serv2d 634; and **In Re Plywood Antitrust Litigation** (E.D. La. 1976) 23 FR Serv2d 303.

injury and damages.[20] This conflict in result among the decisions seems to reflect more a factual difference in the cases themselves than a difference over legal principles.[21] Thus in cases where the fact of injury and damage breaks down in what may be characterized as "virtually a mechanical task,"[22] "cap-

20 **Plekowski v. Ralston Purina Company** (M.D. Ga. 1975) 68 F.R.D. 443, 455, **mandamus denied** 557 F. 2d 1218 (1977); **In Re Transit Company Tire Antitrust Litigation** (W.D. Mo. 1975) 67 F.R.D. 59, 75; **Hettinger v. Glass Specialty Co., Inc.** (N.D. Ill. 1973) 59 F.R.D. 286, 294 (the damage and impact issue would create "a plethora of mini trials"); **Gneiting v. Taggares** (N.D. Ill. 1974) 62 F.R.D. 399, 407; **Chmieleski v. City Products Corp.** (W.D. Mo. 1976) 71 F.R.D. 118, 156, ("***in antitrust cases in which damages***are a significant element in plaintiffs' class action claims and in which final relief relates predominantly to damages, certification under Rule 23 (b) (2) is inappropriate"); **Newberry v. Washington Post Co., supra,** 71 F.R.D. at 27; **Wilensky v. Olympic Airways, S.A.** (E.D. Pa. 1977) 73 F.R.D. 473, 477; **Trecher v. Manning Implement, Inc.** (N.D. Iowa 1976) 73 F.R.D. 554, 563; **Boro Hall v. Metropolitan Tobacco Co., Inc.** (E.D. N.Y. 1977) 74 F.R.D. 142, 146.

21 Judge Gibbons in his dissent in **Link** at 877, states that the difference in the decisions on this point arise from the fact that a number of circuits deny class action treatment in those anti-trust cases "involving a large number of plaintiffs."

22 **Blackie v. Barrack** (9th Cir. 1975) 524 F. 2d 891, 905, **cert. denied** U.S. .

See Note, **Developments, supra,** at 1513 and Practicing Law Institute, **Current Problems in Federal Civil Practice,** 491 (1975):

> "Where the damages are capable of mathematical or formula computation, the class action comes rather close to an ideal one and there is certainly no question of the lack of 'predominance' of the common questions."

State of Illinois v. Harper & Row Publishers, Inc. (N.D. Ill. 1969) 301 F. Supp. 484 489, **aff'd by equally divided court** 400 U.S. 348 (1971), **reh. denied** 401 U.S. 950, is an excellent illustration of this principle. In certifying the action for class treatment, the Court said:

> "If illegal conspiracies raised prices to noncompetitive levels, the purchasers were affected in the same manner and to the same extent."

able of mathematical or formula calculation,"[23] the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability.[24] On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but requires "separate 'mini-trial,[s]"[25] of an overwhelming large number of individual claims, courts have found that the "staggering problems of logistics"[26] thus created "make the damage aspect of [the] case predominate,"[27] and

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In **Blackie v. Barrack, supra,** 524 F. 2d at 905, in finding that liability predominates over causation or damages, the Court said that "the process of computing individual damages will be virtually a mechanical task."

23 Practicing Law Institute, **Current Problems in Federal Civil Practice,** 491 (1975).

24 See cases cited in Note 22.

25 **Shaw v Mobile Oil Corporation** (D.N.M. 1966) 60 F.R.D. 566, 570.

See, also, Note, 27 **Syracuse L. Rev.** at 1263-4:

> The uniformity of the quality and price of the product is also likely to have an impact on the manageability of the suit. When the product is homogeneous in nature, and has an unchanging price during the life of the alleged conspiracy, aggregate damage to the class may be easily determined from sales records for the relevant time period. However, an action involving a commodity available in different varieties or at fluctuating prices necessitates examining each sale to determine the defendant's total liability. In this situation a serious manageability problem arises: the court is likely to devote more time to individual damage issues than to what was believed to be the dominant issue, the existence of a conspiracy. To the extent that these problems arise in anti-trust or other class actions, they render the trial 'a less fair and efficient method of adjudication than other available techniques,' such as the consolidation of individual actions by plaintiffs injured under identical circumstances."

26 **Ralston v. Volkswagenwerk, A.G.** (W.D.Mo. 1973) 61 F.R.D. 427,433.

27 **Trecker v. Manning Implement, Inc., supra,** 73 F.R.D. at 563; **Shaw v. Mobile Oil Co., supra,** 60 F.R.D. at 570.

render the case unmanageable as a class action.[28] And this latter view accords with the purpose of Rule 23 which, was to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[29] The district court must accordingly consider in every case the effect of possible class certification on the judicial system itself. If the effect of class certification is to bring in thousands of other possible claimants, all of whom may assert individualized claims requiring mini-trials with juries, a procedure which "will be tremendously time-consuming and costly," the justification of class certification is absent especially so if the individual plaintiffs are financially able to prosecute individual actions, *Yanai v. Frito Lay, Inc.* (N.D. Ohio 1973) 61 F.R.D. 349, 353, or, if a "test case" approach will likely accomplish the same result under principles of collateral estoppel without involving the court in a morass of individual claims that will bog the court system down interminably. *Gelman v. Westinghouse Electric Corp.* (W.D. Pa. 1976) 73 F.R.D. 60, 68-9;[30] *Link v. Mercedes Benz,*

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28 See cases listed in Note 20.

29 The Advisory Committee's Note, 39 F.R.D. 69 at 102-3.

30 The bellwether case in this regard is **Katz v. Carte Blanche Corporation** (3d Cir. 1974) 496 F. 2d 747, 755-761, **cert. denied** 419 U.S. 885 (1974). This case was criticized in a case note in 88 **Harv. L. Rev.** 825, Primarily becasue the author felt that collateral estoppel is a doctrine which can only be asserted defensively, never offensively. See p. 835. The same point is also made in the note on this case in 21 **Wayne L. Rev.** 1195. It is true that in **Blonder-Tongue v. University Foundation** (1971) 402 U.S. 313, 330, the Court avoided deciding whether the collateral estoppel could be asserted offensively but the trend of modern decisions is clearly in the direction of finding that the principle may be used offensively and defensively. **Gerrard v. Larsen** (8th Cir. 1975) 517 F. 2d 1127, 1130, n. 2; **Zdanok v. Glidden Company, etc.** (2d Cir 1964) 327 F. 2d 944, 955, **cert. denied** 368 U.S. 814 (1961);

supra 550 F. 2d at 869 (Van Dusen, dissenting). Several of the plaintiffs testified categorically that, whether this action was certified as a class action, they were able financially to continue the suit and intended to do so. Their recovery, if their action is successful, is under the district judge's findings, sufficient to induce them to persevere in the prosecution of their action, whether class certification is granted or not.[31] There was accordingly no "death-knell" justification for class action certification. Indeed, it can well be argued that the individual actions, regarded as test cases, would be in this situation a superior procedure to a class action.[32]

Lange v. Heglund (W.D. Wash. 1974) 391 F. Supp. 128, 130. There are, it is true, circumstances where the principle will not be applied either offensively or defensively. Thus, if in the earlier trial the party against whom it is asserted was denied a jury trial, that denial of his Seventh Amendment right makes it improper to permit the doctrine to operate. **McCook v. Standard Oil Company of California** (C.D. Cal. 1975) 393 F. Supp. 256, 258. In this case, however, there is to be a jury trial and this exception will not apply.

31 The panel opinion suggests that the recovery by an individual plaintiff would be insufficient to induce him to persevere in an anti-trust suit absent certification. 539 F. 2d at 1021, n. 1. There were, however, six plaintiffs whose average individual claims would be $16,000. When trebled their award (6 x $16,000), if they prevail, would be about $300,000, to which should be added an allowance of attorney's fees. That cannot be likened to the plaintiffs in **Eisen**, where the individual claim would be only a few dollars; the plaintiffs in this case would be entitled, if they won, to a substantial verdict. Class action cannot, therefore, be rationalized on any theory that unless granted, the action will die nor have the plaintiffs in their testimony so indicated - in fact, their testimony is exactly to the contrary.

32 It is obvious that the common law collateral estoppel rule if it is applied offensively on the basis of a judgment in a private test anti-trust suit, is far more advantageous to a party injured by an anti-trust violation than the prima facie rule of evidence created by §5, on which the panel opinion sets so much store. §5 merely creates at best a rebuttable presumption; the rule of collateral estoppel operates as **res judicata** of the issues decided. If §5 is to be regarded as an argument for severance, to which we refer **infra**, collateral estoppel is a far more potent argument against severance and in favor of the test case route, which would mean the denial of class certification. And this would appear particularly so in this case where the plaintiffs, fully competent financially to maintain their individual actions, would undoubtedly find it difficult to finance the preparation of a list of the possible class members and the mailing of notices to such possible members.

The district court concluded, as we have seen, that in this case computation of damages would be a complex, highly individualized task, imposing an intolerable burden on the judicial system. As we have already indicated, he went to considerable pains to illustrate and pinpoint the difficulties that would be encountered and the reasons no mechanical or simple mathematical method of calculation was feasible. In view of these findings, which are clearly supported by the record, we think that there is a substantial basis for the district court's conclusion that there appears to be no workable formula to aid in computing the damages of each member of the plaintiff class and that the action was unmanageable as a class action.[33] The district court estimated--conservatively, we think--that, in the absence of a practical damage formula, determination of individual damages in this case could consume ten years of its time. The propriety of placing such a burden on already strained judicial resources seems unjustified.[34]

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33 The author in 27 **Syracuse L. Rev.**, while finding some fault with the decision of the district court in this case, did conclude (p. 1284):

> "In **Windham** the differing circumstances under which each claimant was injured made it clear that the action as it stood was not manageable."

34 **See, Schaffner v. Chemical Bank** (S.D. N.Y. 1972) 339 F. Supp. 329, where the Court said at p. 337:

> "... the notion of utilizing a jury trial in a class suit containing the

Plaintiffs answer by declaring that they "expect" to develop a formula, which will simplify the computation of individual damages, at some later point in the litigation. Concededly, a district court should not decline to certify a class because it fears that insurmountable problems may later appear.[35] But where the court finds, on the basis of substantial evidence as here, that there are serious problems *now appearing*, it should not certify the class merely on the assurance of counsel that some solution will be found. *See In re Hotel Telephone Charges*, *supra*, 500 F. 2d at 90, where the Court said:

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varied problems certain to abound herein, is enough to chill any further discussion of the required superiority of a class claim over other available methods for the fair and efficient adjudication of the controversy. Such a trial, whether one trial or the multiple minitrials probably required, would withdraw from all other usefulness for years to come the federal judicial personnel involved. Where one could muster jurors willing to devote themselves so indefinitely in time from their accustomed tasks, is puzzling. And one might relevantly ask - what public interest would be served by devoting the public's facilities in this way and what just purpose requires such a colossal marshalling of judicial resources and their supporting personnel?"

Kline v. Coldwell, Banker & Co., supra, 508 F. 2d at 238 (Duniway, J., concurring):

> "Perhaps more important is the [if certified as a class action] practical effect of such a suit as this. The burden that it can impose on the court-discovery, pre-trial, notice to the classes, etc., and on a jury, if one is ever empanelled, is staggering. It is inconceivable to me that such a case can ever be tried unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, to proof of the damage of each 'plaintiff.'"

35 **Blackie v. Barrack, supra** (524 F. 2d at 901).

> "The District Court in this case has relied on the 'imagination' of appellees' counsel to provide solutions that will, at some point in the future, prevent these individual issues from splintering the action into thousands of individual trials requiring years to litigate. Thus far the appellees have not been able to demonstrate to our satisfaction that the individual questions will not overwhelm the common questions ... The issues raised by the apparent existence of numerous individual questions must be resolved *before* a class is certified, even if certification is conditional." **[Emphasis added]**

Plaintiffs suggest another procedure which they contend would obviate the necessity of individualized proof of the fact and amount of damages. They argue that any difficulties created by that problem could be minimized by the simple expedient of bifurcating the trial, trying first the common issue of "liability" and then (if liability is found) trying the issue of damages either in one mass trial or in a series of mini-trials. The panel opinion would refine the concept of liability into the two elements of violation and injury or causation, and would find that the district Judge was clearly wrong in not severing the issue of violation from the other issues in the case and directing a bifurcated trial.35a It viewed the violation issue as presenting a considerably simpler issue than the other issues in the case and for that reason concluded that a class action would "not present unusual complexities at least so long as only issues of violation are before the tribunal." This view would give no consideration to the fact that generally "'in a private

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35a The panel opinion was approved in the majority opinion in **Bogosian v. Gulf Oil Corp.** (3d Cir. 1977)____F. 2d____, 46 L.W. 2105. We, however, for reasons hereafter stated, find the reasoning in Judge Aldisert's dissenting opinion more persuasive.

antitrust suit there is no neat dividing line between the issues of liability and damages'" and because of the difficulty of establishing this "'dividing line'" any severance of issues in such a case "must be approached with trepidation." [36] In this case, there is such intertwining of the two issues of liability and damages but the panel opinion dismisses such fact with the observation that the "intertwined matters can be appropriately limited by the common sense, skill, and discretion of the trial judge." It is difficult to understand, though, how a trial judge, however skillful, could deny or limit a litigant's right to offer *relevant* "intertwined matter," whether addressed to the issue of violation or that of injury and damage. Even more important: a trial judge cannot, in determining the manageability of a proposed class action, look exclusively to only one aspect of the case as the panel opinion seeks to do; he can and must look at the case as a whole and, as we have seen, consider proof of damages as well as other issues in the case.[37] In this

36 **Response of Carolina, Inc. v. Leasco Response, Inc.** (5th Cir. 1976) 537 F. 2d 1307, 1324.

37 This suggestion apparently gives predominance to the issue of anti-trust violation over the issues of injury and damages in a private anti-trust suit. This, however, is contrary to the rule, already cited and repeated in case after case, that conspiracy to violate is not the crux of the private action. **Cf., also, Illinois Brick Co. v. Illinois** (1977) ___U.S.___, **45** U.S.L.W. **4611**. Even more serious, the suggested rule, if adopted, would in effect amount to an automatic severance of issues and class certification, whenever asked, in every private anti-trust action. This necessarily follows from the reasoning offered in support of the proposed rule, despite the panel opinion's guarded concession that there may be cases where the proposed rule would not apply. Moreover, the proposed rule poses serious problems of standing, which Judge Gibbons, who was inclined to favor the proposed rule, pointed out in his dissent in **Link v. Mercedes-Benz, supra** 550 F. 2d at 876-8. That the difficulty foreseen by Judge Gibbons is real, **see** Sherman, **Antitrust Standing: From Loeb to Malamud,** 51 **N.Y.U. L. Rev.** 377, 400-401 (1976); Note, **Private Plaintiff's Standing Under Clayton Act Section 4: Clothing the**

case, it is obvious that no severance of issues could remove or even alleviate the overwhelming burden of damage mini-trials that class certification would impose on the judicial resources in this case.[38] Whether dealt with in a unitary trial or in a severed trial, the problem of proof of the individual claims and of the essential elements of individual injury and damage will remain and severance could only postpone the

Naked Emperor, 7 Seton Hall L. Rev. 588, 601-604 (1976); Note, **89 Harv. L. Rev.** 1247 at 1256:

> "***As the Supreme Court opinions on this issue demonstrate, however, the public interest [in a private antitrust action] is to be served indirectly by the private party's seeking redress for injuries to himself, rather than by deputizing him as a public representative. While the Court has consistently taken a broad view toward permitting a private party to receive adequate relief for his own harm, it has never suggested expanding the scope of relief beyond these private needs."

Accordingly standing has always been assessed on the basis of the plaintiff's right to recover, that is, on both liability and injury.

Taken to its extreme, the rule, as proposed in the panel opinion would in effect make class certification well nigh automatic. Taken to its extreme, a strict application of standing in determining right to severance, on the other hand, would result in an almost uniform rule against class certification. We recognize that there is some merit in both views but we believe that neither should be regarded as an absolute rule but the facts in each case should be carefully weighed and, after considering all aspects of the case, including the issues of injury and damages as well as of violation, the determination of class certification **vel non** should be made. And this decision should be made by the district judge, who has the greatest familiarity with the complexities of the case. His determination should only be reversed for clear error. This is the principle we apply in deciding this case and it is the one we believe to be the better practice to follow.

38 Handler, **The Shift from Substantive to Procedural Innovations in Antitrust Suits in the Twenty-Third Annual Antitrust Review,** 71 **Col. L. Rev.** 1, 8, 9 (1971) [hereinafter cited as Handler, **"Twenty-third Review"**].

difficulty of such proof.[39] We think, therefore, it is well within the "wide range of discretion" granted the trial court to find that in this case bifurcation would not make the case manageable or warrant class certification.

Nor, as the district judge held, can the difficulties inherent in proving individual damages be avoided by the use of a form of "fluid recovery." Such a method of computing damages in a class action has been appropriately branded as "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."[40] The district court found, as did Judge Gessel in *Newberry v. Washington Post Co.*, *supra*, 71 F.R.D. at 27, that "[d]amage proof [in this case] would be unmanageable if the case proceeds as a class action," because there is no "easy formula" by

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39 See, Handler, **Twenty-third Review, supra**, 71 **Col. L. Rev.** at 8:

> "True, the facts may permit the court to sever the issue of liability and thus postpone discovery and trial on damages; but if the case is to be litigated, this problem will have to be faced eventually and the load the court will have to carry will not be reduced by the delay."

And **see In re Sugar Antitrust Litigation, supra,** 22 F.R. Serv.2d at 663:

> "Bifurcation merely delays resolution of the problem until a later date. Hence, if actual individual damages need be proved, and if such determinations are so predominating that ponderous proof problems of individual damages would tax a court's resources to an intolerable degree, a court would be justified in dealing with the damages enigma at the out set in making its determination as to whether a class action should be certified."

See, also Link v. Mercedes-Benz of N. Am., Inc., supra 550 at 877; and Practicing Law Institute, **Current Problems in Federal Civil Practice,** 491-94 (1975).

40 **Eisen v. Carlisle and Jacquelin, supra,** 479 F. 2d at 1018.

which individual proof of damages may be avoided and that it was "undesirable and impractical for a jury to consider the issue of damages in a separate proceeding independent from the proceeding on liability." We cannot say that a similar finding in this case was clearly wrong. The order of the district court denying class certification is acordingly affirmed.

BUTZNER, Circuit Judge, dissenting:

I dissent for the reasons stated in the opinion Judge Wyzanski wrote for the panel in *Windham v. American Brands, Inc.*, 539 F. 2d 1016 (4th Cir. 1976).

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41 In the testimony taken, there were indications that many of the tobacco growers in South Carolina were unsympathetic to this action. The South Carolina boards of both the Grange and the American Farm Bureau branches in South Carolina had passed resolutions which appear to have expressed their disfavor of the action. We, however, have given no weight to these circumstances in our decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 75-2315

Roy P. Windham, et. al., on behalf of themselves and all others similarly — *Appellants,*

versus

American Brands, Inc., et. al., — *Appellees,*

(Argued May 6, 1976 Decided July 16, 1976)

Before Bryan, Senior Circuit Judge, Craven, Circuit Judge, and Wyzanski, Senior District Judge.*

E. N. Zeigler (Page Dees, John A. Cochrane, John E. Thomas, J. Nat Amrick, Robert C. Howison, Jr. and Frank M. Wooten, Jr. on brief) for Appellants; Murray H. Bring, Attorney, Philip Morris Inc. (Willicox, Hardee, Palmer, O'Farrell, McLeod & Buyck and Arnold & Porter on brief) for Philip Morris Inc., Appellees; William Reynolds Williams, Assistant United States Attorney and Edward M. Silverstein, Attorney, Marketing Division, Office of General Counsel, U. S. Dept. of Agriculture, (Mark W. Buyck, United States Attorney, James D. Keast, General Counsel J. Michael Kelly, Assistant General Counsel, Harold Carter, Assistant General Counsel, John C. Chernauskas, Director, Marketing Division on brief) for Appellee.

*Sitting by designation.

WYZANSKI, Senior District Judge*.

The issue before us is whether in this private action alleging violation of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 and 2, the District Court abused its discretion in denying, with respect to all aspects of the case, class action certification under Fed. R. Civ. P. 23 (b) (3).

July 29, 1974, six named plaintiffs, growers of flue-cured tobacco in South Carolina, complained that seven defendant tobacco companies and the Secretary of Agriculture of the United States conspired, in violation of the Sherman Act, (1) to rig bids and fix prices to force, at prices lower than would have been the situation in a free market, the sale of tobacco by tobacco farmers, including owners of land with tobacco allotments, lessees of allotments, sharecroppers, and tenants, (2) to monopolize the warehouse auction markets for flue-cured tobacco by parallel bidding, collusive bidding, and percentage purchase agreements, and (3) to restrict arbitrarily the amount of flue-cured tobacco which could be sold per day and per week in the auction warehouses and to apportion the available government tobacco inspectors inequitably between South Carolina and Georgia.

October 17, 1974, the District Court, responding to a class action allegation in the complaint, issued a rule to show cause why an order should not be entered determining, pursuant to Fed. R. Civ. P. 23 (a) and (b) (3), that this action be maintained on behalf of a purported class of more than 20,000 South Carolinians who from 1970 through 1974 sold, or had an economic interest in, the sale of flue-cured tobacco in South Carolina, and whose total claims aggregated, according to plaintiffs, more than $335,000,000.

The District Judge permitted the parties to engage in full discovery on the class action issues, presided at the deposition of more than 20 witnesses, admitted extensive documentary materials, and on September 26, 1975 filed a 29-page opinion containing full, precise, and apposite findings which, after careful analysis, led him to conclude that the case should not proceed as a class action because individual issues would predominate over common ones and because the case would be unmanageable as a class action.

Mindful of the weight which Fed. R. Civ. P. 52 (a) demands be accorded to a District Court's findings "unless clearly erroneous," we first summarize what District Judge Chapman Found on the basis of substantial evidence.

Flue-cured tobacco is a non-standardized product grown in South Carolina, Alabama, Florida, Georgia, North Carolina, and Virginia. it is sold almost exclusively at auctions at independent warehouses in each of those states except Alabama. it is sold in individual piles weighing about 200 pounds each.

In South Carolina there were at the time of the trial 36 tobacco warehouses in 11 different geographic markets. The number of warehouses conducting auctions in each geographic market varied from 2 to 7. Most of the flue-cured tobacco grown in Sout Carolina was sold there, but South Carolina growers also had sold large amounts of tobacco in other states.

The quality of tobacco is affected by moisture content, sand content, degree of ripeness, spoilage, disease, method of picking, method of curing, and other factors. The quality may reflect the skill of the farmer, the area of production, and other aspects of

production. Quality obviously affects price. Each tobacco company has its own grading system, and, in addition, the government has a system of 161 grades, which it uses in establishing levels of price support.

Other findings of the judge relate to topics such as whether defendants increased their bids on low quality tobacco to affect prices on high quality tobacco, whether tobacco producers when dissatisfied with market bids sell to government-sponsored stabilization programs, and whether despite an alleged conspiracy covering all 11 markets some defendants bought at only some of those markets, or did not make always the same percentage of their purchases in the same markets, or paid for the same grade of tobacco different prices at differnet times in different places.

The judge, in the light of *Eisen v. Carlisle and Jacquelin*, 479 F. 2d 1005 (C.A. 2,1973), vacated on other grounds, 417 U.S. 156 (1974) (which held that it would be improper to allow a class as such to have a "fluid recovery" assessing gross damages to the class as a whole), also made findings that relate to the vast amount of evidence which probably would be required to prove the fact of impact of the alleged conspiracy upon *each* of the 20,000 proposed members of the class, and the facts with respect to the specific damage each of the 20,000 had individually sustained. But the findings do not address the question whether, if the sole issue before a court and jury were the existence of alleged conspiracies which constituted violations of the anti-trust laws, there would be a substantial difference in the quantum or character of the requisite proof if the plaintiffs included all 20,000 in a class action or only the 6 named plaintiffs.

The findings indicate that there may be among the

potential members of the proposed class some, as the District Judges denominated them, "antagonisms" of interest, in the sense that, because of the quality of their tobacco, or their roles in the market, different individuals may have been differently affected by the alleged conspiracies. Obviously, however, these supposed antagonisms would not prove that defendants did or did not conspire; they would bear chiefly upon the measure of the impacts of the conspiracies if any existed.

Moreover, with respect to impact and damages, the trial court took note of other problems. Plaintiffs had offered no proof that there is, and the judge did not believe that there was, any theoretical or practical over-all workable formula or method to aid in the computation of damages sustained by different individuals. The judge added that no expert could qualify to give opinions concerning the competitive prices of 161 different grades of flue-cured tobacco on each sales day, at each warehouse for each of the four years embraced by the complaint. In short, each of the 20,000 probable members of the class, in order to secure a favorable judgment for him, would require different, and perhaps voluminous, documentary evidence with respect to his individual transactions.

Against these findings of fact and comments thereon, and after concluding that the complaint stated claims within the jurisdiction of the court, upon which relief could be garanted, and after considering plaintiffs' suggestion "in briefs and oral argument...that it would be helpful to try the issue of liability separate from the issue of damages," the District Judge addressed himself to the applicability to this case of Fed. R. Civ. P. 23 (a) and (b) (3), the text of which provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

With respect to the just quoted Rule 23 (a), the District Court decided that (1) the proposed class was not necessarily (apart from other factors) so numerous that joinder of all members would be impractical, (2) there are questions of law and fact common to the

proposed class, (3) the claims of the representative parties are typical of the claims of the proposed class, and (4) the representative parties would fairly and adequately protect the interests of the proposed class. Hence, the District Court held that the prerequisites of Rule 23 (a) had been satisfied.

But the Court then held that plaintiffs had failed to meet the requirements of Rule 23 (b) (3) that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of the controversy." In so holding, the Court gave consideration to what it called the "possibility of bifurcating this action, that is, planning to try the issue of liability separate from the issue of damages." Despite that possibility, the judge concluded that, largely because of the different impacts upon the 20,000 individuals and the elaborate documentary proof that would be needed to trace their transactions and their possible individual damages, "the problems of manageability" were such that plaintiffs' claim of a class action should be denied. Thereupon, the Court ordered dismissal of the complaint as to all others than the 6 named plaintiffs and entered a final judgment against such others.

Pursuant to Fed. R. Civ. P. 54 (b), the District Court certified that final judgment to this Court.

We accept such certification as appropriate. *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (C.A. 3, 1974); *Hayes v. Sealtest Foods*, 396 F. 2d 448 (C.A. 3, 1968). See 9 J. Moore *Federal Practice*, para. 110.13 [9], at p. 186 (2d ed. 1975).

On the merits, we approve of the District Judge's findings and conclusions that plaintiffs satisfied the prerequisites of Fed. R. Civ. P. 23 (a), as an appropriate exercise of his discretion. What troubles us is the lower court's application of Fed. R. Civ. P. 23 (b) (3). Of course, we are mindful that in this case we are not to approach the matter *de novo*, but to defer to the District Judge's exercise of discretion, unless we are convinced that he was plainly wrong. *Barnett v. W. T. Grant Co.*, 518 F. 2d 543, 547 (C.A. 4, 1975); *Cypress v. Newport News General & Nonsectarian Hosp. Ass'n*, 375 F. 2d 648,653 (C.A. 4, 1967); *Clark v. Watchie*, 513 F. 2d 994, 1000 (C.A. 9, 1975), *cert. denied*, 423 U.S. 841 (1975); *Price v. Lucky Stores, Inc.*, 501 F. 2d 1177, 1179 (C.A. 9, 1974); *Wilcox v. Commerce Bank*, 474 F. 2d 336, 342, 347 (C.A. 10,1973); *New York v. International Pipe & Ceramics Corp.*, 410 F. 2d 295, 298 (C.A. 2, 1960).

The District Court was fully aware that, among their suggestions, plaintiffs sought to have that Court segregate the issues as to whether defendants had conspired in the three ways alleged in the complaint, from the issues of which persons were caused to suffer injury from one or more of the conspiracies, and what damages, if any, each of those persons individually suffered.

Unfortunately, because of the plaintiffs' counsel and the District Court's use of the unnecessarily comprehensive term "liability," there was not in the lower court a sufficiently sharp distinction drawn between issues as to the alleged violations of the anti-trust laws, and issues as to causation. Had this line of differentiation been emphasized, the District Court would probably have seen the cross-light which is beamed from Section 5 of the Clayton Act of 1914, 38

Stat. 731, 15 U.S.C. §16 (a). Since that statute was adopted, it has been a Congressional policy that

> "[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

The importance of the statutory provision just quoted is wellknown to those who have followed the course of private civil anti-trust proceedings in the federal courts in the last half century. To cite only one, but perhaps by no means in volume the least significant, set of cases applying the rule that a judgment in favor of the government is available in private litigation as *prima facie* evidence of violation of the anti-trust laws, we refer to the literally hundreds of treble damage actions which drew sustenance from the judgments favorable to the government against leading motion picture producers who had violated the anti-trust laws by conspiracies involving black-booking, clearance practices, arbitration agreements, and other activities. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *United States v. First National Pictures, Inc.*, 282 U.S. 44 (1930). (The hundreds of citations in Sheppard's *Federal Citations* and in the annotated versions of Title 15 of the United States Code show where those two cases have been applied.) Equally instructive are the private actions which built upon the judgment

secured by the government in *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954). See *Herman Schwabe v. United Shoe Machinery Corp.*, 274 F. 2d 608 (C.A. 2, 1960).

15 U.S.C. §16 (a), quoted above, which was originally §5 of the Clayton Act, implies more than it says. It indicates a general policy of aiding those who are injured by violations of anti-trust laws in ways which show Congressional sympathy for the usually small enterprise against the ordinarily large malefactor. As is sometimes said, there is beyond the law of the statute the equity of the statute: that is, the legislature has shown what policy it favors and this is a datum to be given great weight by the judiciary not only in the precise situations covered by the legislative act but in analogous situations where the judiciary has a freer hand but the policy considerations are similar to those in the area specifically covered by the legislative act.

To put the matter clearly and in direct relationship to the problem before us, there is discernible a public policy which tends to simplify the presentation of individual claims of damage caused by what has in a master suit been found to be a violation of the anti-trust laws.

We do not mean to imply that in each and every anti-trust case a trial court should allow plaintiffs to maintain, at least with respect to issues of alleged violation of the Sherman Act, 15 U.S.C. §§1 and 2 or cognate laws, a class action on behalf of others who meet the class standard of Fed. R. Civ. P. 23 (a). There are distinguishable situations. See 3B J. Moore *Federal Practice*, para, 23.45 [2], at pp. 23-759-762 (2d ed. 1975). What we do say is that there is almost a

rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act. Congress and the courts have frequently shown they regard the Sherman Act as an economic "charter of freedom" of hardly less than Constitutional dimensions. it deserves ungrudging, and, as is sometimes said, liberal reading to accomplish its purposes. Without for one moment intimating that the defendants in the case at bar are wrongdoers -- an issue not yet canvassed by evidence, and one on which we have no opinion other than that the burden of proof is upon the plaintiffs to establish defendants' alleged violations of law -- we are of the view that if defendants are proven to have been conspirators, the road to recovery by those who prove they were caused to suffer injury by the violators should be shortened by giving them the benefit of modern procedural devices such as a class action. Without such a short-cut, it might not be economically practical for a holder of a relatively small individual claim to get a recovery to which he is legally entitled.[1]

Approaching in that spirit the facts found in this case by the District Judge, we have concluded that it was an abuse of discretion of the District Court not to allow a class action at least with respect to issues of alleged violation of the Sherman Act. As our review of the lower court's findings discloses, there was no substantial evidence which indicated that the trial of such issues of alleged violation would be noticeably prolonged even if there were 20,000 plaintiffs instead of 6.

1 The District Judge stated that the average claim would exceed $16,000, but he did not estimate the median amount. It was suggested on oral argument before us that some claims might be very large and that thousands would be much smaller than $16,000. The hope of recovering even three times $16,000, not to mention a smaller sum, would hardly lead a prudent man to begin an anti-trust suit.

Assuredly the case with respect to defendants' alledged violations would not have been unmanageable merely because the number of plaintiffs was multiplied by the thousands. Whether defendants conspired as alleged may indeed be either unprovable or very hard to prove, but those difficulties relate principally to what defendants can be shown to have done or said. While proof as to what such violations, if they occurred, caused in the way of damage may become relevant to, and even to some degree intertwined with, issues of violation, nonetheless, if there is a bifurcated trial, with first a hearing only on the issues of violation, *vel non*, the extent of evidence with respect to intertwined matters can be appropriately limited by the common sense, skill, and discretion of the trial judge. He, like the jury, will initially be required to decide only whether defendants conspired as alleged.

Managerial difficulties are always present in big anti-trust cases. But the case at bar, by including a class of 20,000, will not present unusual complexities at least so long as only issues of violation are before the tribunal.

Obviously if plaintiffs cannot prove the alleged conspiracies, that ends the case. If they can, then the District Court, in its discretion, can decide whether the issues of causation and damage shall be disposed of by separate trials for each plaintiff, or whether there shall be one mass trial or several trials with plaintiffs grouped in sub-classes which meet the standards of Rule 23 (b) (3).

We find some support for our opinion in the following cases, none of which is, of course, precisely apposite. *West Virginia v. Charles Pfizer & Co.*, 314 F. Supp.

710 (S.D.N.Y. 1970), *aff'd*, 440 F. 2d 1079 (C.A. 2, 1971); *In Re Coordinated Pretrial Proceedings in Antibiotic Anti-Trust Actions*, 333 F. Sup 278 and 333 F. Supp. 285, (S.D.N.Y. 1971); *Eisen v. Carlisle and Jacquelin*, 52 F.R.D. 253 (C.D.N.Y. 1971). However, regardless of the analogies, we rest our judgment principally on the directive force of Congressional and judicial policy in anti-trust litigation as applied to problems of class actions sought to be covered by Fed. R. Civ. P. 23 (a) and (b) (3).

Ordered that the judgment be reversed with opportunity to be allowed to plaintiffs to file in the District Court a motion persuant to Fed. R. Civ. P. 42 seeking a separate trial of issues concerning defendants' alleged violations of the anti-trust law, and for further proceedings consistent with this opinion.

BRYAN, Senior Circuit Judge, dissenting:

Not in the slightest unappreciative of the majority's thoughtful penetration into the entirety of this case and of its careful positing of available separable issues, together with their distinctive adaptabilities, my difference with the opinion rests upon its own faithful recognition of both the force of the District Court's fact findings in themselves, F. R. Civ. P. 52, and the force of that Court's discretionary judgment upon them. In re Cessna Aircraft Distributorship Antitrust Litigation, 518 F 2d 213, 215 (8 Cir. 1975), cert. denied November 11, 1975,____US____; *City of New York v. International Pipe & Ceramics Corp.*, 410 F 2d 295, 298 (2 Cir. 1969).

With its factual recital unquestioned, for me the District Judge's decision is not enfeebled by an *abuse* of discretion. I track and stand on his comprehensive and closely scanned findings of fact and conclusions of law, q. v., and so I would affirm.

APPENDIX C

ORDER

IN THE UNITED STATES DISTRICT COURT
For The District Of South Carolina
Florence Division

No. 74-1008

Roy P. Windham, Harden Evans, Joe Skipper, David Nexsen, W. A. Turner and Toby Gaskins, *Plaintiffs*,

versus

American Brands, Inc., Liggett & Myers, Incorporated, R. J. Reynolds Tobacco Company, (R. J. Reynolds, Inc.), Brown & Williamson Tobacco Corporation, The Imperial Tobacco Company (of Great Britain and Ireland) Ltd., Mullins Leaf Tobacco Company, Inc., C. W. Walters Co., Inc., Export Leaf Tobacco Company, Loews Theaters, Inc., d/b/a Lorillard), Philip Morris, Inc., Universal Leaf Tobacco Co., Inc., The Austin Company, Inc. (Greenville, Tennessee), J. P. Taylor Company, Incorporated, Dibrell Brothers, Inc., Gallaher Limited, and Earl L. Butz, Secretary of Agriculture of the United States, *Defendants*.

This matter is before the Court upon motion of plaintiffs seeking certification of this cause as a class action. Through extensive discovey, consisting mostly of depositions taken before the Court, together with briefs of counsel and oral arguments, the issue has been fully exployed and the Court must now decide if the plaintiffs satisfy Rule 23 of the Federal Rules of Civil Procedure.

PENDING MOTIONS AND BACKGROUND

The complaint sets forth three causes of action. It is alleged in the first and second causes of action that the company defendants, "with the knowledge, consent and acquiescence" of the Secretary of Agriculture (hereinafter referred to as Secretary) conspired to fix, control, lower and stabilize prices and conspired or attempted to monopolize the warehouse auction markets for flue-cured tobacco in violation of §1 and 2 of the Sherman Act. These actions by defendants allegedly occurred prior to July 15, 1974, the opening day of sales for the 1974 crop, and commenced as early as July 1970. This suit was filed July 29, 1975, and the first and second causes of action pertain to the four marketing seasons 1970 through 1973 and the first part of the 1974 season.

For a third cause of action plaintiffs allege that the company defendants and the Secretary unlawfully conspired "to fix, control and restrict ... the amount of flue-cured tobacco which could be sold per day and per week in the auction warehouses available to plaintiffs ... to apportion the available inspectors to various marketing areas, to restrain trade ..., and to preclude plaintiffs ... from selling their tobacco as it becomes ready...." This conspiracy allegedly took place on or about December 14, 1973, therefore, only the 1974

season would be affected.

Plaintiffs have moved for leave of court to amend the third cause of action pursuant to Rule 15.[1] The proposed amendment covers alleged inequitable apportionment of inspectors between South Carolina and Georgia and states "no allegation of this complaint should be construed as an effort to amend, modify, or change the 'designation system' ...."

The company defendants assert that the motion to amend is not an effort to "clarify" the complaint, but rather an effort to change the basic nature of the third cause of action because discovery has revealed, as will be discussed more fully hereinafter, that many tobacco farmers support the "designation system". Defendants contend that granting an amendment of this type would be improper and prejudicial at this stage of the case, since the evidence of farmer support of the "designation system" indicates that plaintiffs cannot properly represent the class.

The proposed amendment does not change completely the nature of the third cause of action. The new allegations tend to narrow the claim by alleging anti-trust violations in connection with the apportionment of available inspectors between the State of South Carolina and the State of Georgia. The defendants will not be prejudiced by allowing plaintiffs to amend. Any intra-class adversity that might effect plaintiffs' ability to adequately represent the class could be dealt with consistent with Rule 23, as is more fully discussed under the heading of "typicality". Therefore, plaintiffs' motion to amend is granted. The

1 Rule 15 (a) provides in part: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

proposed third amendment attached to said motion, which has been served on all parties, shall govern the case consistent with further Order of this Court.

Also pending is the defendant Secretary's motion to dismiss pursuant to Rule 12, or, in the alternative, for summary judgment under Rule 56, on the following grounds: (1) The Court lacks jurisdiction with respect to the issues involved since plaintiffs seek, in effect, to bring an unconsented suit against the United States; (2) the complaint fails to state a claim upon which relief can be granted and (3) the Secretary cannot be in violation of the anti-trust laws for administering the flue-cured tobacco inspection and price support programs in accordance with their enabling statutes.

The Secretary cites *Parker v. Brown*, 317 U.S. 341 (1943) which involved an anti-trust attack on a California stabilization program for the raisin industry. The Supreme Court held that the Sherman Act would not render the California Agricultural Prorate Act invalid, even, assuming the program would be invalid if made effective by a conspiracy of private persons.

> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *Parker* at 351.

The instant case is distinguishable. Plaintiffs allege the Secretary conspired with private persons in violation of the anti-trust laws, while Parker did not involve a combination of state and private action.

> "... we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of

trade." (cite omitted). *Parker* at 351 and 352.

The Secretary contends that the Court lacks jurisdiction of this case because plaintiffs have brought an unconsented suit against the United States. This is an area of the law that is not precisely defined.

> "There is no general statutory jurisdiction over actions against federal officers and agencies. Such actions must find independent grounds for jurisdiction. The extent to which sovereign immunity may bar such a suit against an officer for actions done in his official capacity is an extraordinarily difficult question that the Court's decisions have failed to clarify." (footnotes omitted). C. A. Wright, Law of Federal Courts, at page 71 (1970).

The Secretary cites *Larson v. Domestic and Foreign Corp.*, 337 U.S. 682 (1949) which involved a suit by an individual against the head of the War Assets Administration for an injunction prohibiting the sale or delivery of certain coal to anyone other than the plaintiff who felt that he had a contractual right to the coal. The Supreme Court held that sovereign immunity did apply.

> "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign." *Larson* at 695.

The important prerequisite to finding sovereign immunity, as expressed above, is met when "the actions of an officer do not conflict with the terms of his valid statutory authority". The Court in *Larson* was aware that there may be suits for specific relief against officers of the sovereign which are not suits against the sovereign itself.

> "... where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the soverign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim or error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." (footnote omitted) *Larson* at 689 and 690.

Clearly participation in an anti-trust violation that is not in furtherance of a legislative command would be outside the scope of the Secretary's authority, therefore, the doctrine of sovereign immunity would not protect him.

Additionally, the Secretary asserts that the relief

sought is in the nature of mandamus and would require that this Court order the Secretary to carry out the functions which are discretionary rather than ministerial and the complaint fails to state a claim upon which this Court can grant plaintiffs' requested relief.

The relief sought against the Secretary is stated in general terms, to wit, "for a mandatory order and/or injunction requiring the defendant, Secretary of Agriculture, to discharge the respective duties of his office...." The allocation of Government inspectors as between Georgia and South Carolina based on grower designation might well be the type of official function that this Court cannot properly control. But, if defendant Butz is found to have acted in excess of his authority, as alleged, restraint of his conduct would be proper injunctive relief from this Court. See *Larson*, *supra*, at 690.

The Court concludes that the complaint states a claim upon which relief can be granted, the Court has jurisdiction to grant the relief sought and there are genuine issues of material fact; therefore, the Secretary's motion to dismiss and in the alternative for summary judgment are denied. The Secretary may renew his summary judgment motion at a later date and after the evidence is further developed if he be so advised.

The named plaintiffs have commenced this action for themselves and are requesting this Court to make them the representatives of all other South Carolinians who are "cooperators" or "producers" of flue-cured tobacco within the meaning of Title 7 of the

United States Code §1441[2] during the period 1970 through 1974. Based on the deposition testimony of Barney Page of the Agricultural Stabilization and Conservation Service it appears that there are no South Carolina producers of flue-cured tobacco who do not qualify as cooperators. The evidence reveals further that flue-cured tobacco grown in South Carolina is marketed as a result of participation of all four classes of producers, i.e. owners of land with tobacco allotments, lessess of allotments, sharecroppers and tenants. Many individual producers have the characteristics of more than one of these four classes of producers.

Flue-cured tobacco is sold by auction in individual piles at independent warehouses. In South Carolina there are presently 36 warehouses in 11 different geographic areas. Most South Carolina grown flue-cured tobacco is sold in South Carolina; however, large amounts have been sold in North Carolina, Georgia, Florida and Virginia. The grower designa-

2 7 U.S.C. §1441 authorizes and directs the Secretary of Agriculture to make price supports available to "cooperators" for any crop of any basic agricultural commodity, which includes tobacco (see 7 U.S.C. §1428 (c)).

The terms "cooperator" and "producer" have been used interchangeably in this case. The statutory definitions indicate that cooperators are producers of a certain crop that qualifies for price supports.

> "A 'cooperator' with respect to any basic agricultural commodity shall be a producer on whose farm the acreage planted to the commodity does exceed the farm acreage allotment for the commodity under subchapter II of chapter 35 of this title . . .." 7 U.S.C. §1428 (b).

7 C.F.R. §719.2s defines 'producer' as follows: Person who as owner, landlord, tenant, or sharecropper, is entitled to share in the crops available for marketing from the farm or in the proceeds thereof . . .."

tion system, which was effective for the 1974 season, removes price support from sales made more than 100 miles from the county seat of the county in which the particular farm is located, but it does not prohibit out-of-state sales.[3]

Plaintiffs' contend that defendants conspired to rig the bidding at tobacco markets and to hold down the price to the injury of every tobacco farmer in South Carolina. Plaintiffs claim further injury as a result of the alleged inequitable distribution of Government graders.

RULE 23 (a)

In order to qualify as a class action under Rule 23, the action must meet all of the requirements set out in Rule 23 (a), which are: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

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3 The so-called grower designation system was put into effect prior to the 1974 tobacco season by regulation adopted by the Secretary. 39 F.R. 17753 and §1464.2(ii) provides in pertinent part as follows:

> "(ii) Producer designation of warehouses. Producers will be required, as a condition of price support, to designate the warehouses at which they will market their tobacco. Such designations may be at any warehouse or warehouses in any market within a radius of 100 miles from the county seat of the county in which the farm is located . . .. A producer may obtain price support only in a warehouse he has designated, and at such warehouse only with respect to the quantity of tobacco he designated for sale at such warehouse."

As explained in this Court's decision in **Warr v. Butz**, 379 F. Supp. 268 (D.C.S.C. 1974), the Secretary adopted the above regulation in order

RULE 23 (a) (1)
NUMEROSITY

There is no question that joinder of all members of the class would be impractical. The complaint estimates the class at 11,000, however, the Court feels that this is a very conservative estimate. Barney Page of the Agricultural Stabilization and Conservation Service testified for plaintiffs that in 1974 alone there were approximately 13,000 different farms in South Carolina on which tobacco was grown. Since a farm might have several tenants the number of cooperators might greatly exceed the number of tobacco farms. The fact that this suit covers a period in excess of four years must also be considered in estimating the numerosity of the class. Page estimated that there were approximately 30,000 names on the voter eligibility list of South Carolina tobacco farmers, tenants and operators during the relevant period. Plaintiffs own computer analyst, Richard C. Hoyt, estimated that the class, including lessees and sharecroppers, would total 20,000 to 25,000 persons. From these estimates, the Court concludes that it is reasonable to assume the purported class will number at least 20,000.

RULE 23 (a) (2)
COMMON QUESTIONS OF LAW AND FACT

The existence of questions of law and fact common to the class is equally clear. The common questions of law and fact in this, and presumably in any other civil treble damage action, is whether or not the defendants did or did not violate the anti-trust laws. Aside from deciding the existence of common questions under RULE 23 (a) (2), the Court must decide whether these same questions predominate, which will be discussed under RULE 23 (b) (3).

RULE 23 (a) (3) and (4)
TYPICALITY AND REPRESENTATION

In this case the prerequisites of Rule 23 (a) (3) and (4) are closely related. The latter requirement has been interpreted by Judge Medina in *Eisen v. Carlisle and Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968) as follows:

> "What are the ingredients that enable one to be termed 'an adequate representative of the class?'
>
> To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved as a collusive suit or that plaintiff has interests antagonistic to that of the remainder of the class." (391 F. 2d at 562-63)

Defendants do not question the qualifications of plaintiffs' counsel to handle this type lawsuit. The Court recognizes that plaintiffs are represented by able counsel, familiar with anti-trust litigation and experienced in the field of agricultural litigation.

Being satisfied with the counsel aspect of representation, the Court turns to whether there are conflicting interests among the named plaintiffs and/or between the named plaintiffs and the class. This is basically the same question raised by the requirement of typicality.

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to alleviate the disorderly marketing that had been experienced previously. These prior problems stemmed largely from the fact that, during much of each buying season, the quantity of flue-cured tobacco ready for marketing far exceeded the quantity that could be graded by the number of government graders available or processed by the tobacco companies.

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> "The second Rule 23 (a) (3) requirement is that the representative claims be typical of the other members of the class. This has consistently been held to mean that his claim cannot be antagonistic to the claims of other members." (citations omitted). *Thomas v. Clarke*, 54 F.R.D. 245 (D.C. Minn. 1971).

Defendants contend that the named plaintiffs' deposition testimony and the third cause of action, as originally stated, reveal a position on grower designation of warehouses that is in direct conflict with the feeling of the vast majority of the South Carolina producers; and, consequently typicality does not exist, the named plaintiffs cannot adequately represent, and the purported class should not be certified, citing *Giordano v. Radio Corp. of America*, 183 F. 2d 558, 560 (3rd Cir. 1950) and *Silhvan v. Winn-Dixie Greenville, Inc.*, 62 F.R.D. 370, 375 (D.C.S.C. 1974) as follows:

> "The interests of the representatives of the claim must be co-extensive with the interests of other members and groups within the class. There must be no possibility of any antagonistic interests since the allowance of a class representative with antagonistic interests to other members of the class would deny unnamed members of the class due process. (cite omitted.)"

Defendants' witnesses confirmed that many South Carolina tobacco farmers favor the 1974 regulations relating to grower designation of warehouses. Also, South Carolina farm orgainzations, including the South Carolina Farm Bureau Committee, favor designation which was upheld by this Court in *Warr v. Butz*, 379 F. Supp. 268 (D.C.S.C. 1974).

It appears that at least some adversity among members of the purported class does exist. But as a practical matter, even if the motion to amend the third cause of action had not been granted, the existing adversity could be reconciled with Rule 23 without destroying the class entirely. While the opt-out provisions of Rule 23 (c) (2) appear inappropriate to cure this problem,[4] it is clear that the designation issue could provide the theoretical basis for denying class action treatment to the third cause of action without denying class action treatment to the first two causes of action. Another alternative would be the use of sub-classes to separate the opposing views. The desired result in either case would be to eliminate antagonism so that the reasoning of *Giordano* and *Sullivan* would not apply.

The thrust of the lawsuit contained in the first and second causes of action alleges conspiracy to fix bids and force the sale of tobacco at prices lower than they would have been absent the conspiracy. The named representatives participate in the activity of growing tobacco in a variety of ways. On deposition each expressed dissatisfaction with the tie bidding and resulting price paid to him for his piles of tobacco. The anti-trust issues override the differences of opinion among members of the purported class on designation as a whole or the grader allocation procedures, therefore, class certification will not be denied on that ground.

Within the context of the first two causes of action, defendants assert that other antagonistic interests

4 See **Free World Foreign Cars, Inc. v. Alfa Romeo,** S.P.A. 55 F.R.D. 26, 29 (S.D.N.Y. 1972) and **Alberton's, Inc. v. Almagated Sugar Co.,** 62 F.R.D. 43, 54 (D. Utah 1973), modified on other grounds, 503 F. 2d 459 (10th Cir. 1974).

exist which are fatal to plaintiffs' attempt to maintain a class action.

The fact that some of the named plaintiffs feel they would benefit from a wider price spread between the best and worst quality tobacco and others assert that the current spread is too wide does not present a problem since the unanimous desire is obviously higher prices. However, there is one aspect of the price spreads that requires close attention.

The evidence indicates that the tie bidding occurred primarily on top quality tobacco, and that buyers who made substantial purchases of low quality tobacco have for that reason received, through allocation by the auctioneer, extra amounts of the higher quality tobacco which has been subject to tie bidding. It appears that the buyers in order to obtain more of the desirable tobacco which is subject to tie bidding, increased their bids on the lower quality tobacco. As a result defendants contend that farmers who produce low quality tobacco have interests antagonistic to plaintiffs producing higher quality tobacco, citing *Alberton's Inc. v. Amalgated Sugar Co., supra.* The Court finds the reasoning in *Alberton's* relevant and sound but supportive of plaintiffs' position on the question of typicality.

Alberton's involved an anti-trust class action by persons in a specified geographic area who purchased beet sugar from the two defendant manufacturers pursuant to a multiple base point pricing system, i.e. one where each purchaser paid the same price plus freight charges from a "base point", which was different from the defendant's refinery.[5] As a result the

5 The reason was so defendants could compete in distant markets with cane sugar manufacturers.

purchasers located near the base point paid the lowest delivered prices. The complaint alleged that defendants (1) engaged in a continuous combination and conspiracy in unreasonable restraint of interstate commerce and trade; (2) attempted to monopolize the market; (3) fostered an illegal tying agreement and (4) discriminated in price between purchasers. Class status was denied on the claims based on tying arrangements and price discrimination because the relief sought, enjoining all "objectionable" contracts, would effectively end base point-pricing. Since some of the class members were themselves competitors, the possibility of the elimination of base point pricing presents the basis of a clear conflict in interest among the class. However, the Court of Appeals for the 10th Circuit allowed the class action to proceed on the claims based on conspiracy and monopoly because any relief which might be granted would not necessarily put an end to the base point-pricing system.

While *Alberton's* raises a serious question for this Court, it cannot deny class status on the same grounds upon the evidence that has been presented. First, it is not clear to the Court that there are tobacco farmers who benefit from tie bidding on an overall basis. The tobacco farmer who sells low quality tobacco on one day may well sell average or superior quality the next day. If this is the case then the interest of the individual class members may not be antagonistic. Secondly, even if there are tobacco farmers who do benefit from tie biddig, it is pure speculation to state the relief sought by the named plaintiffs would eliminate tie bidding. Traditionally tobacco has been marketed by way of auction. If plaintiffs prevail and bid rigging and price fixing are enjoined, the auction system may or may not continue. Assuming that it does continue, there would be nothing intrinsically

illegal about a tie bid, which becomes illegal only when it is the result of an unlawful conspiracy. Presumably, those who do benefit from tie bidding would continue to benefit.

The question of benefits to the seller of a poor pile of tobacco as a result of tie bidding raises other questions regarding predominance and manageability which will be hereinafter discussed.

RULE 23 (b) (3)
PREDOMINANCE

In addition to meeting the above requirements of Rule 23 (a), the action must also satisfy Rule 23 (b) (3) which requires that once the prerequisites of Rule 23 (a) are satisfied, the Court must find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Since common questions of law and fact do exist, the issue becomes whether or not they "predominate". Rule 23 does not define or make exactly clear what is meant by this term. What is clear, however, is that it is not sufficient that common questions merely exist, as is true for the purposes of Rule 23 (a) (2), but the Court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23 (b) (3). 7A *Wright and Miller, Federal Practice and Procedure*, §1778, at page 52 (1972).

Class actions involving anti-trust issues are quite common[6] and plaintiffs feel that this case fits into the general mold, citing *Robertson v. N.B.A.*, 389 F. Supp. 867, 902 (S.D.N.Y. 1975):

> "It has become almost axiomatic that allegations of conspiracy and violation of the Sherman Act satisfy the 'predominance' requirements of this subsection."

While anti-trust actions are often suited for class action the mere allegation that a conspiracy existed to violate the anti-trust laws does not insure that common questions will predominate. Rule 23 provides that the Court shall make various findings. A Court's conditional class action certification based on mere allegations would be an unwarranted avoidance of its duty to decide if those seeking the class have demonstrated that the requirements of the rule have been substantially met. This is particularly true when the Court has had the opportunity to hear many days of deposition testimony and study the various exhibits introduced. See *In Re Hotel Telephone Charges*, 500 F. 2d 86, 89 (9th Cir. 1974).

The *Robertson* action was brought by basketball players of the NBA, and involves issues on merger of the leagues, certain draft procedures and contract provisions. Plaintiffs sought money damages and injunctive and declaratory relief. The "commonality" and "predominance" requirements of Rule (b) (3) were not seriously disputed by defendants and the Court in *Robertson* stated that the class was not large enough

6 The most frequently recurrent types of suits brought under (b) (3) are private triple-damage anti-trust suits, and actions based on various types of securities frauds. 3B **Moore's Federal Practice**, par. 23.45 [2], pg. 23-758 (1974 edition).

to make administration of the suit difficult. (The class contained 365 present and past players, plus future players.) While meeting the requirements of Rule 23 (b) (3), the Court decided that it would be more appropriate to proceed under Rule 23 (b) (1), which does not specifically stress manageability. Clearly, the factual and legal questions in *Robertson* are quite different from the instant case which involves some 20,000 class members, who seek more than one-third billion dollars resulting from alleged price fixing and bid rigging in violation of the Sherman Anti-Trust Act. The Court feels that many of the other cases cited as supportive of the sweeping proposition quoted above are also distinguishable.

For example, *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Calif. 1967) is a case in which the District Court certified a class action involving alleged price-fixing by a franchisor, as well as alleged tying practices. However, a subsequent opinion of the Court of Appeals for the Ninth Circuit held that the price-fixing issue was not an appropriate subject for class action treatment, since its determination "would involve significantly different evidence and separate factual determinations as to each separate franchise and that to impose such a burden in this case would be inconsistent with the basic salutory purpose of Rule 23." *Chicken Delight, Inc. v. Harris*, 412 F. 2d 830, 831 (9th Cir. 1969).

The instant case is distinguishable in several aspects. First, *Chicken Delight's* class contained 650 members, compared with approximately 20,000 here. Second, the class action proceeded on a claim involving alleged tying practices which arose out of *Chicken Delight's* "standard forms of franchise agreements". Finally, a

7 If the franchise contracts varied and proof of tying would

major distinction is the fact that it became apparent to the Ninth Circuit that the 650 member class would overburden the court after the class had been certified and discovery had taken place. In the instant case class determination was not made initially, pending discovery on that very issue.

Discovery reveals that this case does not fit into the category of the "anti-trust model" where all legal and factual issues relating to liability are uniformly relevant to all those allegedly harmed. See 3B *Moore's Federal Practice*, ¶ 23.45 [2], pg. 23-759 (1974 edition).

Tobacco is a perishable commodity that is affected by many variables before it is placed on the auction floor for sale. Such variables include the suitability of the soil, weather conditions, skill of individual farmers, method of picking and method of curing. This combination of variables results in a leaf that may receive one of 161 different grades used by the Government inspectors in furtherance of its price support program. Graders determine the quality of a pile of tobacco based on such considerations as the body, color and texture of the leaf, moisture content, sand and foreign matter content, degree of ripeness, spoilage and disease. The quality of tobacco varies from day to day and from pile to pile. A tobacco plant is cropped throughout the season from the bottom up. Generally, the lower leaves are of a poorer quality and are sold early in the season; however, some farmers may hold their tobacco longer than others in the hopes that the average price will rise.

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necessitate examination of individual franchisees' dealings, the class action may well have been denied altogether as in **Abercrombie v. Lum's, Inc.**, 345 F. Supp. 387 (S. D. Fla. 1972).

Tobacco producers are a class made up of owners of land that has an allotment, lessees of allotments, sharecroppers and tenants. Many producers fit into a combination of these categories.

The non-standardization of product and producer indicates that the defendants may not have acted uniformly with respect to all of the class members. The extent to which this is the case bears directly on the requirements of Rule 23 (b) (3).

Assuming plaintiffs can prove conduct by the defendants in violation of the anti-trust laws, they must also prove the fact of damage or injury resulting therefrom as an essential element of their case. [8]

> "In any anti-trust action the issue of injury is a critical component of the determination as to liability and should not be confused with still another issue requiring individual analysis, i. e. calculation of the amount of damages." *Shumate & Co. v. National Association of Securities Dealers*, 17 F. Rep. Serv. 2d 300, 301 (N.D. Tex. 1973), aff'd, 1975 Trade Cases ¶ 60, 197 (5th Cir. 1975).

As noted earlier, the evidence indicates that tie bidding occurred more frequently on sales of higher quality tobacco; and, in order to receive extra amounts of the better grades, defendants frequently increase their bid on lower quality tobacco. While this practice does not clearly create antagonistic interests among class members, it does create problems in proving injury or the fact of damage to those who sold poorer quality tobacco. The evidence necessary to prove liability as to sellers of poorer quality tobacco

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8 Whether or not common questions relating to the amount of damage predominate will be discussed later under this same heading.

will necessarily differ from that required to prove a general conspiracy. And a realistic view of this case discloses that defendants will offer extensive proof in defense of the assertion of liability to producers of poorer quality tobacco. The fact that there are some 161 different government grades of tobacco will only serve to further complicate matters if the Court were to attempt to extablish which grades were influenced by this allocation incentive.

The evidence also reveals complexities in proving the fact of damage because producers sell tobacco to different categories of purchasers. Some purchases plaintiffs concede give rise to no claim in this action. When the price of tobacco is lower than producers feel it should be, they often sell to the government sponsored stabilization program and receive the price support; and the plaintiffs do not seek damages on those sales. On occasion warehousemen purchase tobacco when they feel that prices are low in order to make their warehouse attractive to the individual producers. Plaintiffs do not seek damages for those sales. Also, a substantial amount of tobacco is sold to large buyers not named as defendants. Of course, these sales to non-defendants, warehousemen and stabilization constitute no injury to plaintiffs. But the purchasing practices of the non-defendant purchasers would be relevant, when compared to the purchasing practices of the defendants, in defense of the general conspiracy allegations.

In addition to the above it is reasonable to anticipate that defendants will introduce evidence of other individual dealings that are relevant to the defense of the issue of conspiracy. For example, it appears that (1) some of the nine defendants will be able to show that they did not buy on all or some of the eleven markets,

which plaintiffs claim to have been subject to the alleged conspiracy; (2) the percentages of tobacco purchased by each defendant have varied from market to market, from warehouse to warehouse, from day to day and from year to year; and (3) identically graded tobacco is purchased at different prices at different times in different warehouses. All of this is relevant in defense of the plaintiffs' allegations of price fixing and attempts to monopolize the market by means of "percentage purchase agreements, parallel bidding, collusive bidding, and other acts."

Thus far in discussing predominance, the Court has mentioned evidence which defendants are likely to introduce, as well as evidence plaintiffs are likely to introduce. When dealing with products and purported class members that are not standardized, this appears to be a logical and realistic approach.

> "In determining whether common issues of law or fact predominate, the Court cannot ignore the issues of fact which are likely to arise in defense of the class actions, and the Court cannot assume that these defendants will waive the opportunity to attempt to discover and present evidence relating to their dealings with the individual class members." *In Re Transit Co. Tire Anti-Trust Litigation*, 1975 Trade Cases ¶ 60, 144 at 65, 417 (W.D. Mo. 1975).

Some of the Court's observations are based on anticipated proof that undoubtedly will be relevant in the trial on the merits. The Court wishes to make it clear that its denial of class action status is not based on an opinion as to the validity of plaintiffs' claims. Some evidence relevant to the merits has been considered solely because the same evidence is relevant to the determination of the propriety of a class action.

In summary, even though there may be common questions of law and fact going to the issue of liability, the determination of the question of liability would involve a vast amount of evidence not related to the class as a whole and it would require factual determinations as to literally thousands of the purported class members. As a result, this Court is convinced that there is a serious question whether the common questions to fact and law are controlling.

Aside from the problems associated with establishment of liability and the fact of damage, plaintiffs will encounter additional problems in proving the amount of damage. Again the non-standardization of product and producers will necessitate individual attention which precludes the use of a workable formula in establishing the amount, if any, of each class member's damage.

> "Most class action certifications that have been permitted even though proof of damage may be a matter of individual proof appear to involve situations where establishing individual damages at least follows an easily ascertained standard pattern. The classic type of price-fixing case where it can be established that each unit sold was at an inflated fixed dollar amount per unit, and individual damages require only proof of the number of units purchased by each claimant, makes class action treatment appropriate. Where, however, individual damages require extensive individual proof of local and varying market conditions to prove loss of profit, the task becomes enormously more complicated." *Bogosian v. Gulf Oil Corporation*, 62 F.R.D. 124, 138-39 (E.D. Pa. 1973).

Here, the complaint states that plaintiffs and others

similarly situated should have received an additional ten cents per pound for the tobacco sold. Discovery has revealed that some sales resulted in no claim of damages and, more importantly, the damages that may be established would not be the same, whether ten cents or any other figure, for each pound sold. Plaintiffs have offered no workable formula or method to aid in the computation and distribution of damages, and the Court knows of none. The only alternative to establishing damages on an individual basis would be to have the finder of fact establish damages based on generalized proof; however, such a method is in direct conflict with the requirements of Rule 23.

> "It has been suggested that generalized proof of damages might suffice under Rule 23. But the rule does not eliminate the ultimate need for individual proof of damages by each member of the class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested. 28 U.S.C. §2072 states in pertinent part: 'The Supreme Court shall have the power to prescribe by general rules, the forms of process . . . and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . .. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.' See *Colgrove v. Battin*, 413 U.S. 149 161, 93 S. Ct. 2448, 37 L. Ed. 2d 522 (1973); Class Action Symposium, 68 Nw. U. L. Rev. 991, 1049 (1974)." *Kline v. Coldwell, Banker and Co.*, 508 F. 2d. 226, 236 n. 8 (9th Cir. 1974) pet. for cert. filed Mar. 20, 1975, 43 U.S.L.W. 3517 (1975).

In briefs and oral argument, plaintiffs suggest that it

In briefs and oral argument, plaintiffs suggest that it would be helpful to try the issue of liability separate from the issue of damages which, it is further suggested, could be referred to a Master. While such a procedure would lessen the load on this Court, it would not result in overall judicial economy because the same individual determinations as to the amount of damages would have to be made. A split trial in this case would further frustrate Rule 23's objective of judicial economy because much of the evidence anticipated at the trial on liability would be duplicated at the trial on damages.

On the question of predominance, thorough discovery and careful consideration convinces this Court that this class action would, in effect, degenerate into innumerable individual lawsuits. Under these circumstances the Court concludes that the common questions of law and fact do not predominate over the individual questions. And as a matter of practicality the requirements of Rule 23 (b) (3) cannot be met because the trial of this suit would be totally unmanageable.

MANAGEABILITY

Defendants contend that the trial of this case as a class action would present formidable problems of management and class action status should be denied on that basis.

Often the literature and case law on Rule 23 refer to the finding of "manageability" as a separate requirement for a class action determination, but actually it is one of the non-exclusive factors which is to be taken into account in making the required findings of predominance and superiority under Rule 23 (b) (3). It is

discussed here under a separate heading so that the Court can focus on its crucial finding – that insurmountable difficulties will be encountered if this case is litigated as a class action.

Establishing the fact and amount of damage in this case would require thousands of individual determinations as noted previously. That, coupled with the voluminous transaction data that must be dealt with convinces the Court that this action is unmanageable.

If this case were to be tried as a class action the parties would have to seek the warehouse receipts and other evidence pertaining to each sale, from all of the purported class members for the five seasons beginning in 1970. The documents pertaining to each individual sale would have to be analyzed to determine the seller, the purchaser, the grade and quantity of tobacco sold, and the price paid. Testimony on most, if not all of the transactions can be anticipated in an effort to establish the fact and amount of damages; because many sales would not result in any damages, and the amount of damages proved would vary from sale to sale.

The evidence shows that there are a variety of relationships among producers themselves that relate to the question of manageability. For example, plaintiffs Windham and Nexsen lease tobacco allotments from others and in turn they divide the revenue from tobacco farming with their own tenants. Thus there are various levels and kinds of economic interests connected with a single allotment. Assuming liability were established, distributing the amount of damage would be a very complex process. many individuals who appear to be producers, as that term has been defined, may have suffered no damage. An example

would be the owner of an allotment, who cash rents the allotment before the growing season begins. Another foreseeable difficulty, assuming liability is proven, is establishing the percent of interest of the producers who have partial interests in single allotment as described above. The fact that many of these agreements were entered into four and five years ago, and the probable informality of many of them further complicates this process.

Regarding manageability plaintiffs stress the small geographical area in South Carolina encompassing the tobacco producers and the auction markets and the relatively small number in the purported class. These are relevant considerations regarding notification and feasibility of subpoena, and the Court agrees that they, alone, would pose no serious obstacle in some class action anti-trust cases. But the Court does not agree with plaintiffs' assertion that "manageability of the class is so apparent as to make the discussion almost academic." Insurmountable complexities can arise in spite of the relative smallness of the geographical area. The Court can envision the possibility of being required to consider or even make a finding on every pile of tobacco sold in South Carolina for the four years.

A purported class of 18,000 new car purchasers in the greater Kansas City area was denied class action status in *Ralston v. Volkswagenwerk, A. G.*, 61 F.R.D. 427 (W.D. Mo. 1973), because, inter alia, individual questions as to the fact and amount of damages would make the action unmanageable:

> "If damages were to be awarded in this action, they should not be based on speculation or a system of averaging. Rather, the compensation due each individual member of the class must necessarily

> reflect the damages actually suffered by that party . . .. A recognition that each member of the class would have a right to come into court and give evidence raises staggering problems of logistics. Manageability could not be assured, or even predicted. To afford manageability by impinging upon substantial rights - or duties - to present individualized evidence is not an acceptable goal of a class action." 61 F.R.D. at 432 and 433.

Similarly, "the complexity of the individual proof of damages" was one of the reasons why the Court *In Re Transit Co. Tire Anti-Trust Litigation, supra*, determined that it was totally unmanageable with only 750 class members.

Plaintiffs assert that a comparative analysis by the Court will prove their contention that this class action is manageable, citing *West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) aff'd, 440 F. 2d 1079 (2nd Cir.) cert den'd, 404 U.S. 871 (1971) (settled cases); *In Re Coordinated Pretrial Proceedings in Antibiotic Anti-Trust Actions* [1971 Trade Cases ¶ 73, 4A2], 333 F. Supp. 278 and [1971 Trade Cases ¶ 73, 699], 333 F. Supp. 285 (S.D.N.Y. 1971); and, especially, *Eisen v. Carlisle and Jacquelin*, [1971 Trade Cases ¶ 73, 563], 52 F.R.D. 253 (S.D.N.Y. 1971).

An analysis of these cases reveals that the plaintiffs' contention over simplifies the factors to be considered in deciding the question of manageability. While class actions with more class members living in a larger geographical area have been maintained, the method of proof of and distribution of damages require close attention. In this respect the cases cited by plaintiff are totally inapplicable, because they support a type of "fluid recovery" theory of damages that has been

rejected by subsequent opinions, the reasoning of which this Court adopts. In fact, the *Eisen* opinion cited by plaintiffs was reversed by the Court of Appeals upon that very point.

> "We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of the class actions and wholly improper." 479 F. 2d 1005, at 1018 (Eisen III) vacated on other grounds, 417 U.S. 156 (1964).

The concept of "fluid recovery" involves a full scale trial at which time the "gross damages" to "the class as a whole" are assessed. This damage fund is paid into the court and the distribution of damages begins by processing claims with the residue being applied in some way for the benefit of the class.

Since notice in the instant case will not constitute the problem it did with the six million people *Eisen* sought to represent, it is not predictable that the instant case will generate an equally "huge residue". But aside from that point, substituting "the class as a whole" for the individual members troubled the Second Circuit greatly:

> "That the claims of many may not be treated collectively or as 'the class as a whole' is what the Supreme Court decided in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) . . ." 479 F. 2d at 1014.

As in *Eisen*, the issues here are fully contested, making the methods used in *West Virginia v. Charles Pfizer & Co.*, *supra*, distinguishable and inapplicable. See *Eisen III* at 1012.

The Court finds that the opinions in the antibiotic Anti-trust actions cited previously are not applicable. The language clearly reveals that the Court contemplated a type of "fluid recovery".

> "The Court's tentative conclusions concerning the trial of the damage issue eases the management problems considerably. Damages would be awarded on a class-wide basis, if and when liability was established and individual claims could be processed administratively after entry of judgment." 333 F. Supp. 278, at 283.
>
> "The defendants have not argued that damages cannot be accurately computed by reliance on sales figures, and the court has concluded, on the basis of information developed to date, that they could not so contend . . .. In these circumstances the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages." 333 F. Supp. 285, at 289.

It appears that the Court envisioned the antibiotic cases as classic type of price-fixing cases as discussed in *Bogosian v. Gulf Oil Corp.*, *supra*, where individual damages require only proof of the number of units purchased by each claimant. Here the defendants vigorously oppose any notion that damages can be computed by reliance on sales figures and distributed by statistical or computer techniques. The Court agrees that no formula would be workable in assessing damages in the present action due to the many variables and the time that would be required to compute the damages would consume years of judicial resources.[9]

9 Assuming that it would take an average of one hour per class

The fact that plaintiffs demand trial by jury adds yet another stumbling block to the plaintiffs' assertion that this case would be manageable as a class action.

> "Certifying class actions when everyone recognizes that the individual claims can never be fully litigated, with the constitutionally guaranteed right of trial by jury, because of the prohibitive cost of litigation, does not lend itself to 'a fair and efficient adjudication of the controversy' and violates the purposes of Rule 23 class actions." *Bogosian v. Gulf Oil Corporation, supra,* at 139.

Also see *Schaffner v. Chemical Bank,* 339 F. Supp. 329, 337 (S.D.N.Y. 1972) and *Gneiting v. Taggares,* 62 F.R.D. 405, 407 (D. Idaho 1973).

SUPERIORITY

In addition to the question of predominance, Rule 23 (b) (3) provides for a finding by the Court "that a class action is *superior* to other available methods for the *fair* and *efficient* adjudication of the controversy." (emphasis added)

> "The superiority element has two facets, although these may not appear as separate in many cases. That is, this criterion should be measured by determining whether it would be worthwhile for the judge and the parties to devote the time and attention necessary to formulate workable methods for disposing of the group claims within one

member to analyze his sales records for over four years and his possible relationship with other producers, it would take 20,000 hours, or 10 years of judicial time, assuming that the case was given undivided attention for 40 hours per week and 50 weeks per year.

> representative action, and, furthermore, whether it would be just to do so even if ti would be convenient. (footnote omitted.)" 3B *Moore's Federal Practice,* ¶ 23.45 [3], pgs. 23-801 and 802 1974 edition).

Both fairness and efficiency have been discussed previously under the headings of predominance and manageability. It is clear that the innumerable individual factual determinations necessary to prove liability, coupled with the vast amount of documentation on the issue of individual damages would tie up much of the Court's time and resources for a number of years. There is no way to gloss over the fact that these problems exist.

> "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the enabling act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" (See 28 U.S.C. §2072) *Eisen III, supra,* at 1014.

Aside from proof of liability, determining the amount of damages and a proper distribution thereof would result in an unfair trial if a fluid recovery approach were utilized; and, since a fluid recovery approach cannot be utilized, a class action trial would be inefficient because of the individual determinations that must be made which would be, to some extent, duplicative [10] of the determinations made in establish-

10 As discussed previously under the heading of Predominance it is anticipated that defendants will attempt to show that, assuming a conspiracy is proven, the sales of lower quality tobacco give rise to no liability or result in less damage per pound than higher quality tobacco.

ing liability.

There is another point that should be made in regard to damages. It seems unrealistic to the Court that an expert could qualify to give opinions concerning the competitive price of 161 different grades of flue-cured tobacco on each sales day, for each of the four years and at each warehouse.

Another topic commonly discussed under the heading of superiority is the substantiality of individual claims. This topic is important because Rule 23 does provide for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The impact of this procedural mechanism is a most valuable privilege where the individual claims would be too small to justify separate litigation. See 3B *Moore's Federal Practice*, supra, at pg. 23-802.

The present case does not represent a situation that exists in many class actions where denial of the class action sounds a "death knell" to the claims of the named plaintiffs and the class as a whole. Based on the estimate of class size (20,000) and the demand for money damages included in the complaint ($335,811,390.00) the average claim would exceed $16,000.00. It appears that the six named plaintiffs are at least average tobacco producers in terms of acreage and sales; therefore, their combined claims would warrant maintenance of this suit on an individual basis, especially since the Anti-Trust Act provides for awarding of attorney's fees.

In a recently filed affidavit plaintiff Nexsen affirmed his 1975 crop to be 100,000 pounds. If he could prove

a damage of $.10 per pound for four years with treble damages a recovery of $120,000.00 plus costs and attorney's fees would result. From the deposition of Nexsen it appears that he has substantially increased his acreage by additional leases since 1970 and he now has 50 acres, so the 100,000 pounds would not apply for each year, but these figures do indicate that the individual claims of plaintiffs are quite substantial.

Testimony shows the other plaintiffs farm the following tobacco acreage:

Windham	31 acres
Evans	8 acres
Skipper	25 acres
Turner	30 acres
Gaskins	20 acres

If they obtain approximately the same yield per acre as Nexsen does, the amount of their recovery for the four years with treble damages could be quite large.

Some of these plaintiffs share crop or have tenants as to some acreage, and these persons have an interest in the crop, but it would be easy to join them as plaintiffs in the present action.

While many producers, such as a sharecropper on a very small allotment, would not have claims sufficient to warrant an independent anti-trust suit of this type, they could seek to join the present action as named plaintiffs. This is not an unrealistic statement in view of the widespread publicity this case has received

since its inception. Of course, even if many small claimants are effectively precluded from asserting their claims, this is not a valid reason to ignore the provisions of Rule 23.

BIFURCATION

Under the headings of predominance and superiority the Court has mentioned the feasibility of bifurcating this action, that is planning to try the issue of liability separate from the issue of damages. To reiterate, the Court's position is that a split trial is not, as plaintiffs contend, a panacea for the problems that this case poses, especially the problems of manageability.

In taking this position the Court is not unmindful of the decisions in cases such as *Samuel v. University of Pittsburgh*, 506 F. 2d 355 (3rd Cir. 1974); *Partain v. First National Bank of Montgomery*, 59 F.R.D. 57 (M. D. Ala, N. D. 1973); *Herrmann v. Atlantic Richfield Company*, 65 F.R.D. 585 (W. E. Penn. 1974); *Mosley v. General Motors Corporation*, 497 F. 2d 1330 (8th Cir. 1974); *Matarazzo v. Friendly Ice Cream Corporation*, 62 F.R.D. 65 (E.D.N.Y. 1974); *City of Philadelphia v. Emhart Corporation*, 50 F.R.D. 232 (E. D. Pa. 1970); *State of Minnesota v. United States Steel Corp.* 44 F.R.D. 559 (D. Minn. 1968); *Like v. Carter*, 448 F. 2d 798 (8th Cir. 1971), cert. denied, 405 U.S. 1045 (1972); *Esplin v. Hirshi*, 402 F. 2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); *Gerstle v. Continental Airlines, Inc.*, 50 F.R.D. 213 (D. Col. 1970); *Katz v. Carte Blanche Corp.*, 52 F.R.D. 510 (W. D. Pa 1971) and *Professional Adjust. Sys., Inc. v. General Adjust. Bur., Inc.*, 64 F.R.D. 35 (S.D.N.Y. 1975). The Court finds that these cases are distinguishable in terms of

numerosity of the purported class, the type Rule 23 (b) class action sought, or the extent to which discovery revealed to the respective courts a realistic view of the problems of manageability.

CERTIFICATION FOR APPEAL

Denial of class action status is not normally a final order appealable under 28 U.S.C. §1291; however, the Court feels that an expedited review by the Fourth Circuit Court of Appeals is appropriate in this case.

Class action determinations are certified for appeal under either 28 U.S.C. §1292 (b) or Rule 54 (b) of the Federal Rules of Civil Procedure. Since this Order is the culmination of a thorough investigation into the class status issue resulting in a denial of plaintiffs' motion to represent approximately 20,000 others similarly situated, Rule 54 (b), governing judgments upon multiple claims or involving multiple parties, seems more suited to this case. Therefore, the Court certifies pursuant to Rule 54 (b) that this Order dismissing the complaint against the absent class members is a final judgment as to them. Judgment shall be entered accordingly and the Court finds no just reason for delay of an appeal. An additional reason for this certification is the Court's awareness that similar actions are pending in the Federal Courts of North Carolina and Kentucky involving many of the same defendants and alleging anti-trust violations in the purchase of tobacco.

CONCLUSIONS

Based on all of the foregoing, the Court finds that the evidence presented does not justify the maintenance of the class action alleged; therefore, plaintiffs' motion for class certification is denied.

By: s/ Robert F. Chapman
ROBERT F. CHAPMAN
United States District Judge

September 26, 1975
Columbia, South Carolina

TRUE COPY
Test:
Miller C. Foster, *Jr. Clerk*
s/Linda N. Richardson
LINDA N. RICHARDSON
By: Deputy Clerk

APPENDIX D

STATUTES AND RULES

Sherman Act

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.**** (15 U.S. Code, Sec. 1)

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.**** (15 U.S. Code, Sec. 2.)

Clayton Act

Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S. Code Sec. 15)

Section 4B. Any action to enforce any cause of action under section 4, 4A, or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred

under existing law on the effective date of this Act shall be revived by this Act. (15 U.S. Code, Sec. 15b)

Section 5. (a) A final judgment or decree heretofore rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A. (15 U.S. Code, Sec.16 (a)).

Section 5(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. (15 U.S. Code, Sec. 16).

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Con-*

ducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into

subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U. S.
FILED
JAN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-925

ROY P. WINDHAM, et al., on behalf of themselves and all others similarly situated,
Petitioners,

v.

AMERICAN BRANDS, INC., et al., *Respondents.*

On Petition for Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

BRIEF OF COMPANY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF COMPANY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The company respondents [1] submit this brief in opposition to a petition for a writ of certiorari filed December 28, 1977. The petition seeks review of a 5 to 1 en banc decision of the United States Court of Appeals for the Fourth Circuit, dated October 11, 1977. That decision affirmed an order of the United States District Court for the District of South Carolina denying petitioners' motion for class certification.

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[1] The Secretary of Agriculture is also a respondent.

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that the District Court had not abused its discretion in denying class certification based on the detailed factual record in this case.

STATEMENT

The petitioners, six South Carolina tobacco farmers, brought this action in 1974, charging the respondent tobacco companies and the Secretary of Agriculture with conspiring to fix the prices paid for flue-cured tobacco sold at auction markets throughout the State of South Carolina. The complaint also alleged that the respondents had monopolized or attempted or conspired to monopolize commerce at the various markets, had conspired to restrict the amount of flue-cured tobacco that could be sold at auction, and had conspired to apportion government tobacco inspectors inequitably between South Carolina and Georgia. The case was brought as a class action, with the named plaintiffs purporting to represent over 20,000 South Carolinians with economic interests in the sale of flue-cured tobacco in South Carolina during the period 1970 through 1974.

Petitioners moved for class certification in October 1974. The parties thereafter had full discovery on the class action issues, and District Judge Robert F. Chapman received extensive documentary evidence and personally presided at the depositions of more than 20 witnesses. On September 26, 1965, Judge Chapman rendered an opinion denying petitioners' motion. That opinion, as the en banc Court of Appeals commented, "carefully and thoughtfully reviewed" the record (Ptn. App. 12a) and set forth factual findings later

described by the Court of Appeals panel and by the entire Court as "full, precise, and apposite" (Ptn. App. 8a, 28a).

1. The District Court Opinion

Briefly, the District Court found that the flue-cured tobacco market was characterized by "[t]he non-standardization of product and producer" (Ptn. App. 59a). Tobacco is a perishable commodity, the quality of which is affected by many factors, including soil type, weather conditions, the skill of the farmer, and the method of picking and curing. As a reflection of the many variations in quality, a given pile of tobacco sold on the auction floor may fall within one of 161 different grades utilized by government inspectors.

Prices paid for tobacco varied over a broad range as well. Indeed, the evidence showed that prices even for identically-graded tobacco varied from day to day, month to month, year to year, warehouse to warehouse, and market to market. The District Court found the buyers' conduct to be similarly disparate. Not all of the respondents purchased tobacco at each of the 36 warehouses or in each of the 11 different geographic areas in which the warehouses are located, and the percentage of tobacco purchased by each respondent varied from area to area, warehouse to warehouse, day to day, and year to year.

Further, the more than twenty thousand tobacco producers who comprise the purported class were found to include owners of land that had allotments,[3] lessees

[3] All of the South Carolina tobacco farmers in the purported class participate in the price-support program of the United States Department of Agriculture. The program limits tobacco production according to an "allotment" system. *See generally Warr* v. *Butz*, 379 F. Supp. 268 (D.S.C. 1974).

of allotments, sharecroppers and tenants—with each category of producer having a different economic interest in the sale of tobacco.

Because of the non-uniformity of product, price, defendants' conduct, and class members' economic interests, the District Court found that, even if a generalized conspiracy were established, there would be non-uniformity in the impact of that conspiracy on the purported class members, both as to fact and amount of damage. Indeed, the nature of the tobacco auction market was such that many farmers who produced lower-quality tobacco actually benefitted from the auction practices complained of, thereby making it impossible for them to satisfy the fact-of-damage element of a private antitrust cause of action.

Moreover, the District Court found that individual questions as to the amount of damage would predominate even as to class members who could prove injury, because there is no formula or other method by which the extent of any class member's damages could readily be determined. The necessity for analyzing thousands of individual transactions of the class members was further underscored by the fact (which petitioners concede) that a large percentage of the total transactions was not even subject to the alleged conspiracy—namely, purchases by warehousemen, by the government stabilization "pool," and by companies which, for one reason or another, petitioners did not choose to name as defendants.

Based on these and other facts, the District Court concluded that common questions did not predominate over the many individual questions in the case. As a result, Judge Chapman further concluded that a class action would be plainly unmanageable, and would, if

certified, necessarily consume years of the Court's undivided attention.[3]

2. The Panel Opinion

A divided panel of the Court of Appeals for the Fourth Circuit reversed. Neither the majority nor the dissent questioned the District Court's findings, and both acknowledged that the denial of class certification must stand absent an abuse of discretion by the District Judge. Nevertheless, Senior District Judge Wyzanski of the District of Massachusetts, sitting by designation, concluded on behalf of himself and Judge Craven that the District Court should have certified a class at least for the purpose of determining whether the respondents had violated the antitrust laws. Judge Wyzanski stated that "there is almost a rebuttable presumption that . . . a class action should be allowed where there is a plausible claim of violation of the Sherman Act" (Ptn. App. 35a-36a).

In reaching this conclusion, Judge Wyzanski expressed the view that the case would not present unusual complexities "at least as long as only issues of violation are before the tribunal" (Ptn. App. 37a). He did not, however, disagree with the District Court's determination that the case as a whole would be unmanageable and would present questions which were predominantly individual rather than common. Nor did he suggest any workable basis for deciding the myriad individual questions to which the District

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[3] The District Court conservatively estimated that, were the case to proceed as a class action, the determination of individual fact issues would require 20,000 hours, or 10 years of judicial time, assuming that the case was given undivided attention for 40 hours per week and 50 weeks per year (Ptn. App. 69a-70a, n.9).

Court had referred. Senior Circuit Judge Bryan dissented, citing the District Court's "comprehensive and closely scanned findings of fact and conclusions of law" (Ptn. App. 39a).

3. The Decision of the Court of Appeals Sitting En Banc

The Fourth Circuit granted rehearing en banc, reversed the panel, and affirmed the denial of class certification. The Court's opinion (per Judge Russell) first took note of a district court's customary discretion in deciding the practical and largely factual questions involved in determining whether a proposed class action is manageable (Ptn. App. 9a-10a). The Court then undertook a thorough review of the factual situation presented here, focused on the individual issues in the case, and reaffirmed the District Court's findings that it would be impossible to presume class-wide injury in this case or to compute damage to the individual class members on the basis of any formula.

The resulting manageability problems, the Court noted, were increased by "the variety of claims as asserted by the various plaintiffs" (Ptn. App. 12a), and by the fact that proof of liability and proof of damages were inextricably intertwined in this case (Ptn. App. 22a). Finding that a class action, even if limited to the issue of antitrust violation, would ultimately degenerate into a plethora of time-consuming, separate "mini-trials"—at odds with the purpose of Rule 23—the Court of Appeals held that the District Court had acted within its discretion in denying class certification.[4] Petitioners seek review of this judgment.

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[4] Judge Butzner dissented for the reasons stated in Judge Wyzanski's opinion for the panel (Ptn. App. 25a).

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE DISTRICT COURT AND THE EN BANC COURT OF APPEALS ARE MANIFESTLY CORRECT AND DO NOT WARRANT THIS COURT'S REVIEW

Despite petitioners' scattershot arguments, this case involves only the narrow question whether the District Court abused its discretion by refusing to certify a class and dismissing the complaint against unnamed class members.[5] That issue, decided by the District Court and by the Court of Appeals en banc on the particular facts of this case, is of insufficient general importance to merit Supreme Court review. In any event, the decision below is correct.

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[5] There is no dispute between the petitioners and the company respondents as to the appealability of the District Court's order. Appellate jurisdiction was specifically based on the District Court's entry of an order under Rule 54(b) dismissing the complaint against unnamed class members. Such an order is an appealable "final order" under 28 U.S.C. § 1291. *See, e.g., Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *In Re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 216 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *but see West* v. *Capitol Federal Savings and Loan Ass'n*, 558 F.2d 977 (10th Cir. 1977). In any event, the order denying certification in this case could be treated as appealable under 28 U.S.C. § 1292(b), for the opinions of the District Court and the Court of Appeals panel indicate that § 1292(b) certification would have been granted and accepted if necessary (Ptn. App. 32a, 75a). This case is, therefore, wholly unrelated to *Coopers & Lybrand* v. *Livesay, cert. granted* Nov. 14, 1977, which involves neither Rule 54(b) nor a § 1292(b) certification, but simply the question whether an order denying class certification, without more, is a "final order" within the meaning of 28 U.S.C. § 1291 under the so-called "death-knell" doctrine.

Rule 23(b)(3) provides, in part, that an action may be maintained as a class action if the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Pertinent to these findings are "the difficulties likely to be encountered in the management of a class action."

The law is clear that the evaluations of manageability and predominance called for by the Rule, and the ultimate decision whether to certify a class, are matters within the sound discretion of the District Court. *See, e.g., Barnett* v. *W. T. Grant Co.,* 518 F.2d 543, 547 (4th Cir. 1975); *Clark* v. *Watchie,* 513 F.2d 994, 1000 (9th Cir.), *cert. denied,* 423 U.S. 841 (1975); *Wilcox* v. *Commerce Bank,* 474 F.2d 336, 347 (10th Cir. 1973); *New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969). Petitioners concede as much (*e.g.,* Ptn. at 31, 35). Because the District Judge exercised his discretion against certifying a class action in this case, petitioners must show not merely that Judge Chapman could properly have certified the case but that the arguments favoring certification were so overwhelming that he erred as a matter of law when he failed to do so. Petitioners have made no such showing, and, we submit, could not do so on the basis of the record below.

A. The Record Provides Overwhelming Factual Support for the District Court's Discretionary Denial of Class Treatment

As the en banc Court of Appeals held, the District Court's factual findings have abundant support in the

record, and provide a solid basis for its determinations as to the predominance of individual questions and the unmanageability and inferiority of a class action in this case. Those findings, which petitioners chose not to discuss in their legal analysis, demonstrate conclusively that class certification would have turned this case into a procedural nightmare.

Against the background of an industry characterized by non-uniform products, prices, and conduct, Judge Chapman correctly concluded that the trial of the liability issue alone (*i.e.,* violation and fact of damage) on a class basis would quickly become unmanageable. Thus, even as to the single element of conspiracy, the trier of fact would have to determine whether one or more conspiracies existed, and, if so, whether they operated continually and extended to all South Carolina producers and warehouses, or covered only certain markets, warehouses, farmers, types of sales, or grades of tobacco. The difficulty in making evidentiary determinations, sorting out disputed fact issues, and preserving a sensible order of proof would escalate according to the scope of the claims.

The complications relating to the fact-of-damage element of the liability issue would also be overwhelming, in light of the District Court's uncontradicted finding that some class members actually benefitted from the auction practices complained of—thereby precluding a presumption that all class members were injured even if one or more conspiracies could be proven. As the District Court found, trial of the fact-of-damage element alone would require individual analysis of each class member's sales over a four-year period—hardly the type of factual setting necessary to satisfy

the predominance or manageability requirements of Rule 23(b)(3).[6]

Even assuming liability could be established, there would remain the staggering problem of fixing damages for those class members who could establish that they were injured. The District Court's finding, affirmed by the Court of Appeals, was that there is in this case no workable formula or other mechanical method of computing damages that could eliminate the need for a virtually endless series of mini-trials to adjudicate each putative class member's claim.[7]

The District Court also found that a bifurcated trial would not ease the formidable manageability problems created by the presence of these individual issues. As Judge Russell's opinion for the Fourth Circuit en banc states, bifurcation would be impractical because of the intertwining in this case of the issues of violation, injury, and amount of damage (Ptn. App. 21a-22a). Moreover, bifurcation would be a temporary remedy at best; the deluge of mini-trials required by class certification would not disappear, but would only be postponed (Ptn. App. 22a-24a). The facts of this case, therefore, vividly underscore the statement by the Court of Appeals for the Second Circuit that whether to grant a separate trial for part of a case "is a matter of common, garden-variety district court housekeeping, an exercise of the district court's broad discretion in controlling the order of developing facts and issues at trial." *Schine* v. *Schine,* 367 F.2d 685, 687 (2d Cir. 1966).

[6] Petitioners appear to contend that proof of individual injury is no longer required under the antitrust laws. Citing this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), they argue that "[d]amage is assumed . . . for those who deal directly with the violators" (Ptn. at 19). Obviously, *Illinois Brick* did not do away with the statutory requirement that the private antitrust plaintiff must prove that he was "injured in his business or property" by the alleged unlawful conduct. Clayton Act § 4, 15 U.S.C. § 15. *See also Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

[7] While petitioners continue to insist, without any factual basis, that a formula could be developed (Ptn. at 24-26), they have presented nothing to warrant this Court's disturbing the concurrent findings of both lower courts on this issue. *See, e.g., International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 343 (1977), and cases cited therein.

In view of the foregoing, Judge Chapman's decision to deny class certification was plainly within his discretion—a discretion that is entitled to particular deference here because the Judge personally supervised and was intimately familiar with the development of the complex facts on which his judgment rests. *See, e.g., New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2nd Cir. 1969).

B. Petitioners' Approach Would Eliminate the Discretion Vested in the District Courts, Contrary to Rule 23 and the Decisions of this Court

Petitioners argue in effect that district courts must grant automatic class certification in virtually every private treble-damage action that includes an allegation of conspiracy. Petitioners are forced to such an approach by the absence in the record of any evidence indicating that this case satisfies the requirements of Rule 23(b)(3). Indeed, if a district court were held to have abused its discretion by denying class status on the facts of this case, then class certification must be virtually automatic.

This was the implication of the panel opinion written by Judge Wyzanski, upon which the petitioners so

heavily rely. The panel majority attempted to create a "presumption" in favor of class certification "where there is a plausible claim of violation of the Sherman Act" (Ptn. App. 36a). While the presumption purported to be "rebuttable," and while the opinion stated that a class action need not be maintained in every case (Ptn. App. 35a), it is difficult, if not impossible, to imagine a case that would not fall within Judge Wyzanski's expansive doctrine.[8] Thus, as one commentator concluded, the panel—"[u]ndaunted by a lack of precedent"—would have in effect created "an antitrust exception to the requirements of Rule 23." 62 Cornell L. Rev. 177, 198, 199 (1976).

Such an approach would be wholly inconsistent with the language and meaning of Rule 23 and the decisions of this Court. Since class certification is to be granted under Rule 23(b) only if common questions "predominate" over individual ones, Judge Chapman need not have certified a class simply because this case, like all antitrust conspiracy cases, may involve some common questions regarding the existence of a conspiracy. The resolution of the predominance issue must depend on the facts of each case. As the Advisory Committee's Note to Rule 23(b)(3) states: "Private damage claims by numerous individuals arising out of concerted antitrust violations

[8] Certainly the requirement of a "plausible claim" of Sherman Act violation is no real limitation. Since Judge Wyzanski conceded in the same paragraph of his opinion that there was no basis even to intimate that respondents were wrongdoers, a "plausible claim of violation" apparently means nothing more than the allegations of a well-pleaded complaint. Furthermore, this Court has held that class certification may not turn on a preliminary inquiry into the substantive merits of the underlying claim, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 197-98 (1974).

may or may not involve predominating common questions." 39 F.R.D. 73, 103 (1966) (emphasis added).

Petitioners attempt to circumvent the language of Rule 23 by stressing the importance of the class action device in vindicating the claims of individual class members who may lack the means or the incentive to initiate separate proceedings. The short answer to this argument is that it cannot be relied upon to justify the creation of an unmanageable litigation or the departure from the plain letter and meaning of the Rule.

We do not suggest that class certification should be denied in all complex antitrust cases. By the same token, there is no support for the notion that a case is to be deemed certifiable as a class action simply because it is an antitrust case. Indeed, the concept of presumptive certification in certain types of cases has already been rejected by this Court. Only last Term, the Court unanimously emphasized that in cases involving racial discrimination—where class treatment is frequently appropriate—certification is not automatic and "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395, 405 (1977). Similarly, the Court in *Eisen* v. *Carlisle & Jacquelin, supra*, 417 U.S. at 175-76, enforced the "best notice practicable" language of Rule 23(c)(2), despite petitioner's contention in that case that to do so would end the suit and frustrate his attempt to vindicate the antitrust and securities claims of individual class members.[9] As the Court held in

[9] In this connection we note the District Court's finding, affirmed by the Court of Appeals, that several of the named plaintiffs have the financial incentive to continue this suit even if class certification is denied (Ptn. App. 72a-73a, 18a).

Eisen, Rule 23 must be read as written, and should not be modified or short-circuited to accommodate any particular group of plaintiffs or type of action.

Petitioners' reliance upon a theory of automatic or presumptive certification for antitrust cases is, in effect, a concession that the record here contains no support for a conclusion that the District Court abused its discretion in denying class certification. As the en banc Court of Appeals held, the record compels the conclusion that Judge Chapman was correct in holding that common questions would not predominate, and that the case could not be managed as a class action.

II. THE FOURTH CIRCUIT'S EN BANC DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

Apart from being correct on its own terms, the decision below accords with the body of law that has developed in antitrust cases initiated under Rule 23. While petitioners have cited some 16 instances in which the Court of Appeals' en banc decision purportedly departs from the precedents of this Court and other Courts of Appeals, these supposed "conflicts" are nonexistent. This case, for example, has nothing to do with the tolling problems the Court considered in *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), and *United Air Lines, Inc.* v. *McDonald,* 432 U.S. 385 (1977).[10] Similarly, this Court's decision in *Illinois*

[10] Petitioners also seem to claim that *American Pipe* and *McDonald* are inconsistent with the en banc Court's dictum concerning a "test case" and collateral estoppel approach (Ptn. App. 17a, 18a & nn. 30-32). Since that discussion was speculative and not critical to the Court's reasoning, we do not address it here, except to state that the Court of Appeals did not, as the petitioners suggest, hold that denial of certification was appropriate because the

Brick Co. v. *Illinois,* 431 U.S. 720 (1977), is wholly unrelated to the Rule 23 questions presented here.

With regard to claimed conflicts with the decisions of other Courts of Appeals, the en banc decision below correctly observed that these so-called "conflicts" "seem to reflect more a factual difference in the cases themselves than a difference over legal principles" (Ptn. App. 15a). Unlike the situation here, in many of the cases cited by petitioners, classes were certified because the facts permitted a presumption of common injury. Further, the amount of damages could be computed by a formula or other workable method short of individual "mini-trials." Hence these cases, rather than pinpointing a need for Supreme Court review, emphasize the folly of automatic class certification of antitrust cases and the wisdom of an approach that allows district courts the discretion to decide class action questions in light of the particular circumstances of each case.

Finally, the Fourth Circuit's en banc decision does not conflict with either *In re Sugar Antitrust Litigation,* 559 F.2d 481 (9th Cir. 1977), or *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434 (3d Cir. 1977), *petition for cert. pending sub nom. Gulf Oil Corp.* v. *Bogosian,* No. 77-740. The Ninth Circuit in *In re Sugar Antitrust Litigation* decided only that the order certifying a class in that case was not reviewable by mandamus. The Court expressly disavowed any opinion on the merits of the certification, and cited Judge Wyzanski's panel

test case approach was superior. Rather, the Court held that the case was not certifiable because it failed to meet the requirements of Rule 23(b)(3). The Court then noted, in passing, the possibility that a "test case" approach might be utilized.

opinion in *Windham* simply to show that the District Court's certification was not such "clear and indisputable error" that mandamus would lie. 559 F.2d at 483.

Bogosian is a Sherman Act "tying" case, and the Third Circuit Court of Appeals devoted most of its opinion to issues involving the substantive elements of plaintiff's cause of action—none of which is relevant here. Significantly, the Court did not order certification of a class, but remanded the case to the District Court to reconsider whether in light of the Court of Appeals' substantive rulings, the fact-of-damage issue could be viewed as a common question. In this connection, the Court of Appeals observed that "[w]hether or not fact of damage can be proven on a common basis . . . depends upon the circumstances of each case." 561 F.2d at 454. Regarding the further possibility of bifurcation, the Third Circuit cited—but, contrary to note 35a in the *Windham* en banc opinion (Ptn. App. 21a, n.35a), did not "approve"—Judge Wyzanski's panel opinion in the present case. The Court in *Bogosian* never reached the bifurcation issue; if and when it does so, it will have the benefit of Judge Russell's en banc opinion in *Windham*.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

ROY P. WINDHAM, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This case presents a single question: whether the district court abused its discretion in ruling, on the basis of facts developed during extensive pre-trial proceedings, that the case should not proceed as a class action. The court of appeals, sitting *en banc*, concluded that the district court had not abused its discretion, and there is no reason for further review by this Court.

1. Petitioners, six South Carolina tobacco growers, filed this action in the United States District Court for the District of South Carolina, charging that the respondent tobacco companies had conspired among themselves, with the acquiescence of the Secretary of Agriculture, to fix prices in the market for flue-cured tobacco in South Carolina. Petitioners sought certification of a plaintiff

class of all tobacco growers in South Carolina, and the district court conducted extensive proceedings to determine whether that class should be certified.

At the conclusion of those proceedings, the district court declined to certify the class (68 F.R.D. 641; Pet. App. 40a-76a). It held that the common questions of law and fact in the case do not predominate over the questions affecting only individual members of the class; that a class action would be unmanageable; and that a class action would not be superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Because it appeared that the allegedly unlawful conduct affected different class members in very different ways, the court concluded that class action treatment of the case would raise insuperable problems in determining whether, in what ways, and to what degree particular class members were injured by the respondents' conduct. The class action, the court concluded, "would, in effect, degenerate into innumerable individual lawsuits" (Pet. App. 69a-70a).

Similarly, because of the complexity of assessing the proof of injury necessary to establish liability, and because petitioners had demanded a trial by jury, the court concluded that if permitted to proceed as a class action, the suit would consume a minimum of ten years of trial time (Pet. App. 66a). Finally, the court noted that the combined sum of the damages claimed by the six named plaintiffs was substantial enough that it was likely that the suit could be maintained as an individual action, and that denial of certification would not have the effect of terminating the action altogether.

A panel of the court of appeals held that the case should have been certified as a class action, at least for adjudication of the issue of liability, in light of what it

considered "almost a rebuttable presumption that such a class action should be allowed where there is a plausible claim of violation of the Sherman Act" (Pet. App. 35a-36a). The *en banc* court disagreed and held that the district court had not abused its discretion in ruling that the case should not proceed as a class action (565 F. 2d 59; Pet. App. 1a-25a).[1]

2. As the *en banc* court suggested, if denial of class certification in an antitrust case is ever appropriate, it was appropriate here.[2] The district court found from pre-trial proceedings, in which the court took an active part (Pet. App. 41a), that the case would be enormously difficult and time-consuming to try as a class action and that even on the issue of liability the court would likely founder amidst a mass of individualized claims of differently situated class members. Besides pointing to the difficulty of determining the existence of injury and damages to various class plaintiffs, the court of appeals observed that the complaint had alleged a wide range of illegal conduct with differing effects on different plaintiffs (*id.* at 12a-13a). Accordingly, the court concluded that this case is peculiarily ill-suited to class-wide adjudication, even on the issue of liability (*id.* at 13a-14a).

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[1]The United States has only a limited interest in the issue presented by this case, because the Secretary of Agriculture is not subject to antitrust liability for his official actions and because, even if damages are ultimately awarded in this private treble damage suit, they cannot be recovered against the United States. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671; *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533. The Secretary's motion to be dismissed as a party was denied by the district court (Pet. App. 43a-46a), but that issue is not before the Court because only the class action issues were certified for interlocutory appeal (Pet. App. 75a).

[2]Petitioners' contention to the contrary, the provisions of Rule 23 apply with the same force in antitrust cases as in any others; no class

Notwithstanding the vehemence of petitioners' argument, there is nothing in the least extraordinary about the decision of the *en banc* court of appeals. Because of the fact-bound nature of the inquiry, the class certification decision is properly committed to the discretion of the district court.[3] Indeed, the case on which petitioners chiefly rely as creating a conflict in the circuits emphasizes that the question whether a claim can appropriately be litigated on a class-wide basis necessarily turns on the facts of each case. *Bogosian* v. *Gulf Oil Corp.*, 561 F. 2d 434, 455 (C.A. 3).

For the reasons given in the district court's opinion and in the opinion of the *en banc* court of appeals, the district court did not abuse its discretion in denying the class certification motion in this case. Further review by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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of cases enjoys special treatment under Rule 23. See *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395, 405.

[3]Every court of appeals follows this rule. See, *e.g.*, *Cross* v. *National Trust Life Insurance Co.*, 553 F. 2d 1026 (C.A. 6); *Peterson* v. *Oklahoma City Housing Authority*, 545 F. 2d 1270 (C.A. 10); *Guerine* v. *J & W Investment, Inc.*, 544 F. 2d 863 (C.A. 5); *Castro* v. *Beecher*, 459 F. 2d 725 (C.A. 1); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F. 2d 295 (C.A. 2).

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